EUNOMUS:

OR,

DIALOGUES

CONCERNING THE

LAW AND CONSTITUTION

OF

ENGLAND.

WITH

An ESSAY on DIALOGUE.

By EDWARD WYNNE, Esq.
Late of the INNER TEMPLE.

The SECOND EDITION.

VOLUME II.

LONDON:
Printed for BENJAMIN WHITE and SON, at
Horace's Head, Fleet-Street.
MDCCLXXXV.

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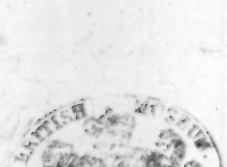
702



EUNOMUS.

DIALOGUE II.

Sunt Jura, ſunt formulæ de omnibus rebus conſtitutæ, ne quis aut in genere Injuriæ aut ratione actionis errare poſſit: expreſſæ ſunt enim ex uniuſcujuſque damno, dolore, incommodo, calamitate, injuria publicæ a Prætore Formulæ, ad quas privata lis accomodatur.

Cic. pro. Q. Rosc. §. 8.

EUNOMUS.

DIALOGUE II.

§. 1. ABOUT a week after the former viſit, Policrites determined to put his Friend in mind of the promiſe he then made him, of continuing the ſubject of their former converſation.

Accordingly he ſet out early in the morning, and found Eunomus enjoying the ſerenity of the ſeaſon, under the ſhade of an aged oak, in a field not far from the houſe. I hope (ſaid he to Eunomus) you will not think I intend to be leſs attentive to your diſcourſe, tho' on a dry ſubject, when I propoſe that you ſhould begin it where you are. What converſation can be more

agreeable than that tranſcribed from the Tuſculan retreat? Or do you think theſe fields are more averſe to Law, than the "Olive grove of Academe" was to Philoſophy?

Not to canvaſs the reality of the charming converſations laid in thoſe places (replied Eunomus, with ſome rapture) you ſurely do not forget, that the exiſtence of thoſe Athenian ſhades you mention, were thought, even by a friend of Plato's, to have been chiefly in Plato's writings. And I can not help thinking, that many of thoſe haunts of philoſophers and poets we read of, if not altogether created, are chiefly immortalized by deſcription. Undoubtedly it is in the power of fancy to make the reflection often more agreeable, than the real images themſelves: either by ſeparating certain circumſtances, which may deform the things them-

themſelves; or by combining in the imagination what Nature has kept diſtinct. But, I know not how, the few Moderns who have printed converſations, have generally been ſo far of your opinion, as to lay the ſcene of them out of doors; either, we are told, they were held in a garden, in an evening's walk, or under a rock by the ſea ſide. Whether all this is done by way of improving upon the Antients; or whether writers of this caſt, think by ſuch plaſtic ſcenery to work upon the minds of their readers, and to pre-engage the affections on their ſide, by transfuſing a calm of mind, moſt proper for their diſquiſitions, I will not determine: but that method will not be ſo proper for us. The aſſiſtance of books will be ſo neceſſary to perform in any degree, what you aſked of me, that without any inſinuation of your

being likely to liſten to the bleating of yonder ſheep, rather than to me; or keeping your eye fixed on the corn, ſome time after I have done talking of treſpaſſes: Without any ſuſpicions (I ſay) of this kind, it will be more adviſeable for us to adjourn to the ſtudy . . . .

. . . . Which Policrites readily agreed to, when Eunomus had promiſed him, that to avoid the interruption they met with laſt time, he would not be at home to any one.

§. 2. When they had retired within doors, and were ſeated, Policrites began, by obſerving, that whatever connection in Theory might ſubſiſt, tho' he much doubted, whether there was any connection between the ſeveral branches of our Law, as they properly fall under the attention and practiſe of Lawyers, he was amazed to think, how they

they could ever be examined by the ſame perſon: many of them ſeeming to be a profeſſion of themſelves, and treated as ſuch, in reality, by thoſe who addict themſelves to one branch only, however dependent that branch might be on others. Do but conſider (ſaid he) the ſpecies of men called ſpecial Pleaders: a life occupied in drawing declarations, pleas, and demurrers! Theſe people furniſh the language and converſation of Courts; yet few of them are ſeen there themſelves; like Poets, they plan the Drama, which others are left to perform. And then turn your eye on the Conveyancers, what heaps of precedents are they forced to examine, tranſcribe and imitate? There are others again, always upon the wing; their life one continued ſcene of controverſy, with Plaintiff and Defendant perpetually

ringing in their ears! If they had the real ubiquity which the law figuratively aſcribes to the King, of "being preſent in all his Courts at once," it would ſcarce anſwer their purpoſe, unleſs they had as many eyes, ears, and tongues, as Virgil's Fame. Then of what a jargon of different languages are our Laws compoſed, and commented in? I would even conſent to have our own native tongue proſcribed from our Courts, rather than have it increaſe the variety and diſcord of our ſtyle; when any one language, either Latin or French, (which, however, in our uſe of them, are ſo patched and party-coloured, as to be full as much one as the other) would expreſs the ſenſe with equal clearneſs and preciſion. Beſides this, the very Courts are barriers to their own Counſel; the experience of Common Law and Equity being too diffu-

diffuſive to mix well together. Conſider all this, and tell me, what leiſure can they have to examine the theory of their own particular Art? How much leſs can they be able to form an acquaintance with Hiſtory, and the genius of the whole Engliſh Law and Conſtitution? And after this, to ſoar with Plato till they reach the ſpirit of all Laws, derived from the nature, faculties, and ſituation of man, as endowed with reaſon and formed for ſociety?

EUNOMUS.

Your imagination muſt deſcend a little from theſe very high flights before I can expect to convince your reaſon or clear your doubts. I am glad, however, to ſee the effects of our laſt conference in the reſtoration of Plato to your eſteem, whom I never thought

to

to have heard mentioned ſo honourably, from your temper at that time. I muſt hope too, that you will not expect me to anſwer all thoſe queſtions in one breath, as you have propoſed them. To do them juſtice, I muſt handle them diſtinctly.

You ſeem to me to have thought it a neceſſary qualification for your profeſſion to be ready to take either ſide of a queſtion to argue: I can ſcarce otherwiſe account for the ſingularity of your conduct on this occaſion, in chuſing to ſet out in viewing every thing on the wrong ſide. I might for that reaſon begin, by reminding you, that every one ought to have a good opinion of his own Profeſſion; at leaſt let the good and the bad be weighed together. I may venture to affirm in this caſe, the light and ſhade will form a juſter portrait and a more pleaſing

picture. This I ſhould have more largely inſiſted on, if I had not ſome ſuſpicions, that the choice of the wrong ſide of the queſtion was at bottom directed by farther views than that of opening a field of argument; and was in reality intended to echo the objections of the world; and after a fair controverſy, if poſſible, to ſilence them. At leaſt I will do you the juſtice to ſay, you have many on your ſide: and as error defended by example, may paſs for truth, it will be better worth while to ſtrip it of its diſguiſe.

§. 3. One obſervation, however, ſeems to be entirely your own; it is not certainly the voice of the multitude: and tho' it carries with it the air of ſcholarſhip, does not ſeem ſo well ſupported by good ſenſe, by which I would ever wiſh to ſee learning diſtinguiſhed. Your objection, I think, to

ſtate

ſtate it fairly, is not ſo much that the laws are publiſhed, and practice carried on in our native tongue, but that other languages are intermixed with it; and thence you ſeem to argue, that if our own tongue is not ſufficient for the purpoſe, rather make uſe of any other that is, than introduce ſuch a confuſion by variety.

POLICRITES.

You have ſtated my objection in terms; but before you anſwer it, ſee what I have to ſay in aid of it. I am not ſpeaking againſt an Act of Parliament: it is ſufficient for the world, that the Engliſh language has gained poſſeſſion by law. The reaſons for making and for continuing the law, it is my duty to ſuppoſe, exiſt at this day, as the law itſelf does: I only aſk what thoſe reaſons are? Why has not the

the Engliſh language a more univerſal dominion, in excluſion even of terms of art, barbarous in this view and abſurd. If the Engliſh language is not adequate to every purpoſe, the Latin is: at leaſt our anceſtors, in the univerſal uſe of it, were not ſo wiſe as I am willing to eſteem them. 1. It is evident that for many centuries, the Latin language was almoſt the general vehicle of the ſenſe of the nation in Records, Acts of Parliament, and even in private Deeds: and without going back to the Saxon period, Laſt-Wills themſelves were penned in this language.

2. That the Latin language (for the French, as a living one, was, tho' much uſed, always liable to ſome of my objections) has been employed, not only by our own, but by all civilized nations in their Law proceedings.

3. It can ſcarce, from ſo conſtant a uſe of it, be ſaid to be unnatural, tho' a dead language: nor is it, as ſuch, peculiarly unintelligible: and tho' you was pleaſed to ſay my objection was not the voice of the multitude, who, to be ſure, would not give up their own language, yet, I believe, the multitude are as much ſtrangers to the ſubject, tho' it is in their own language, as if it was in a Latin. But now in the mean time, how did the multitude do from the Conqueſt till Q. Elizabeth's time? Practice, perhaps, began to indulge them with the free uſe of their own Language at that time; but the Law did not interpoſe in their favour till the other day. The ſubject then, I conclude, not the language, is to be blamed as unintelligible.

4. But

4. But if the people had no real diſadvantage from their ignorance of a "dead Language," I am ſure they had real advantages in its certainty and conciſeneſs, which they in vain expect from a living one. Our own in particular has, in this reſpect, been found to be immoderately prolix and equivocal. Why? But becauſe every man, with ſcarce learning enough to have entitled himſelf to clergy in former times, is maſter of his own Language enough to make him think he can draw pleadings and conveyances. And why, tho' he uſes every word in the Language, when one alone would have expreſſed his meaning, or have anſwered the purpoſe, is it ſtill liable to perpetual diſpute; but becauſe a living Language muſt always be moſt open to ſubterfuge, equivocation and reſerve? In proof of this aſſertion, I

ſhall

ſhall barely appeal to our modern wills, ſettlements, and pleadings, compared with thoſe of our anceſtors; which are equally exceeded in length, and in being ſubject to diſpute.

5. One argument I ſhall ſum up all in, that the profeſſion has at leaſt a chance of being more liberal in that view than in this. Dictionaries and abridgements will not then have the chief hand in making ſome Lawyers; and the Profeſſion by being more learned will become more liberal: for tho' I do not inſinuate, that purity of practice, which is eſſential to the liberality of a profeſſion, is a neceſſary conſequence of greater knowledge; yet, upon the whole, it is a more probable conſequence than otherwiſe. Thus you have my reaſons for the objection; I will rather preſume upon your memory, than tire your patience in

in recapitulating; and will not affect perorations, where I would not wiſh to perſuade.

EUNOMUS.

Perhaps you will diſclaim affecting the art of the diſputant, as you have done that of the orator: and yet, I know not how, you have been tempted to miſlead by fallacy, and to miſtake the ſhadow of truth, for truth itſelf. Do not think I mean to laugh at your arguments, inſtead of anſwering them, when I profeſs myſelf ſurpriſed that you, who on all occaſions, I know, are as much an advocate for the muſes, as you appear to be for the Latin Language on this occaſion, do not inſiſt, that all our Laws and Law-Proceedings ought to be in verſe. Bad verſe would be as tolerable as bad Latin; the difficulties and delays of pleading

would not be much greater in this reſpect than they were before; they would be in a few learned hands, as they were when Proceedings were in Latin. And as practice is the capital argument to recommend one abſurdity, I do not think it would be wholly deficient in this. I might, as you have done, mention with triumph, that not only Records, but Charters and Wills have been written in verſe; Embaſſies have been delivered in verſe; Hiſtories have often been penned in metre: nay, as verſe is agreed to have been the original form of all writing, why ſhould not all kinds of writing ſtill appear now and then in this form, as well as in plain proſe. It is clear we have antiquity to countenance even this abſurdity. Ariſtotle tells you, the Agathyrſi had all their Laws in verſe; and Tacitus, that the Germans had no annals

annals but what were ſo: and your own country Druids, were both Poets and Lawgivers; "Magnum numerum "verſuum ediſcere dicuntur," ſays Cæſar: you know they rarely committed any thing ſacred to writing, or elſe undoubtedly they would have left their myſteries in verſe. This way of talking would have been a ſufficient anſwer to your argument, deduced from mere practice and example, if you had not urged the antiquity and extent of the practice in this reſpect, as preſumptive evidence of its being reaſonable. I am now, therefore, to encounter the argument in a more ſerious manner. And the firſt thing I muſt take notice of is, that what "you "was pleaſed to ſum up all in," might, without any prejudice to your cauſe, have been entirely omitted. We are of one mind in our wiſhes, as to the

liberality of the Profeſſion; but I muſt differ from you, in thinking that important point is at all concerned in the preſent queſtion. I agree with you in allowing the Profeſſion has a fairer chance of being more liberal, as it is more learned: and, I believe, the fact will bear me out in ſaying, the Profeſſors of the Law were never more generally learned, than they are at this time. It is much owing, no doubt, to the education of the times; when the Univerſity is made the almoſt conſtant ſtep to the Bar. And it is with the utmoſt pleaſure, in this view, that I recollect the late noble regulation of our Law-ſocieties, ſo commendably unanimous in promoting this plan of ſtudy; that when themſelves have been ſtyled of old "Univerſities;" and certainly are, in their nature, a noble model of Academical Inſtitution, for the

the ſingle purpoſe of ſtudying Municipal Law; they have yet paid that juſt reſpect to the Univerſities where ſcience ranges at large; have conſidered how neceſſary the elements of other parts of learning, taught to any purpoſe in thoſe places alone, are, towards forming a Lawyer properly ſo called, that they have allowed the time ſpent in College, to make up part of the limited ſtanding for the Bar: and have by thoſe means, I hope, made what had before been too much a by-path to the Profeſſion, the public road to Weſtminſter-Hall. But as Weſtminſter-Hall itſelf is a publick road for the whole Kingdom; and the greateſt part of thoſe who are obliged to travel it, have never been at the Univerſity, what obſtacles would you throw in your Clients way, by making them hear their Caſes diſputed in an unknown

tongue? by making them pay for having all their concerns tranſlated into Latin, and after all, have Judgment againſt them, merely becauſe your Latin is bad? becauſe you have expreſſed them in words not to be underſtood; when, in reality, there are no words in the Language to expreſs them in? or to avoid the riſk of a probable inconvenience, run into a certain one much greater, by ſwelling the Record with an *anglicé* in every ſentence, as the conſtant practice was, becauſe the furniture of a kitchen or a ſhop (for inſtance) cannot be intelligibly rendered into Latin?

I muſt allow, the obſcurity of Law Proceedings will ſubſiſt to every body but Lawyers, was it entirely in an Engliſh dreſs. And this will be a vindication of its not being ſo; but ſtill making uſe of an intermixture of Latin

and

and Norman words. That obſcurity is owing no doubt to the uſe of technical terms: and any one in England, not converſant in Law Proceedings, would, I believe, no more underſtand Sir Thomas More's queſtion, put into Engliſh, than the Sophiſt at Bruſſels did, when it was in Latin. The anecdote is this: It ſeems, according to the humour of thoſe times, public Theſes were maintained in the Univerſity at Bruſſels, during which, a formidable diſputant ſtarted up, who gave a challenge to all mankind; and was ready to enter the liſts on any queſtion, in any art, or ſcience. Sir Thomas (who was then part of the Engliſh Ambaſſador's retinue) accepted the challenge, and with great humour ſtated a queſtion, the very terms of which, he was ſure, none but an Engliſhman, and a Lawyer, could under-

ſtand: two great chances on his ſide! it was *An averia ꝯapta in withernamiâ ſint irreplegibilia?* That is, "whether "beaſts taken in withernam are irre-"pleviable?"—for my argument will not loſe by tranſlating it. A knowledge of the Language, it is plain, would not lead to a knowledge of the queſtion. The conſequence was; the Sophiſt was ſtruck dumb, and the whole City, we are told, were happy in having his arrogance ſo artfully defeated. Apply this ſtory to our preſent ſubject: it is not the dead or the living Language in either caſe, but the technical terms that occaſion the obſcurity. When a Mechanic ſpeaks to me of the inſtruments and operations of his trade, I ſhall be as unlikely to comprehend him, as he would me in the Language of my Profeſſion, tho' we both of us ſpoke Engliſh all the while.

while. Is it wonderful then, if in ſyſtems of Law, and eſpecially among the haſty recruits of commentators, you meet (to uſe Lord Coke's expreſſion) with a whole army of words that can not defend themſelves in a grammatical war? Technical Language, in all caſes, is formed from the moſt intimate knowledge of any art. One word ſtands for a great many, as it is always to be reſolved into many ideas by definitions. It is, therefore, unintelligible, becauſe it is conciſe, and it is uſeful for the ſame reaſon.

Tho' what I have offered will be a ſufficient reaſon for uſing our own Language as far as we can; and ſome vindication for uſing foreign terms, where we can not: ſomething may be ſaid for that great harſhneſs of ſtyle, which we muſt ſtill be doomed to encounter

counter in our old Books, Records, and Acts of Parliament.

The barbarity of ſtyle then, in our old Books and Laws, ariſes, I conceive, from one or both of theſe cauſes. 1. Either from the uſe of words, ever unknown to the Language in which they are penned: or, 2. From the obſoleteneſs of the Language. I do not ſee why either ſhould at all reflect upon Law Proceedings, becauſe they are both common to other compoſitions, in certain circumſtances, as well as to Laws.

1. The obſcurity ariſes from the uſe of ſuch words as were before unknown to the Language; which is the caſe of many terms of art, that have an additional obſcurity to that of their being confined to the art itſelf, and never applied in common life, in their being often

often borrowed from the laws or uſage of other countries, where the terms were, perhaps, proper and familiar. And this is the caſe where one nation learns any art or ſcience, already eſtabliſhed and grown up to maturity in another. It is what we have done as to Painting and Muſic from Italy, as to Philoſophy from Greece and Rome, and as to Legal Terms, in many reſpects, from the Normans.

All then that can be done in any compoſition, to familiariſe foreign terms, is to give them a termination ſuitable to the Language into which they are introduced. This is what our Laws, when written in Latin, have done to Norman and Saxon terms. This (as Sir W. Temple obſerves) is what the Romans themſelves did, when they had occaſion to import foreign names of places into their own Language.

Language. This Tully did, when he tranſplanted the Greek Philoſophy to Rome; Xenophon, when he treated of Perſian affairs; writers of the New Teſtament, in mentioning Roman places and cuſtoms: and, what is more to our purpoſe, when the Roman Law, on the removal of the Imperial Seat, was tranſlated into Greek, Roman Terms of Art were chiefly preſerved.

2. But the bare obſoleteneſs of Language, independent of Terms of Art, will alone make our Laws, or any antient compoſition, unintelligible, barbarous and uncouth. It is the natural effect of time upon Language, as wrinkles are of age upon features. In Tully's days, the Laws of the Twelve Tables were become obſolete and obſcure: and Quintillian tells us, the "Saliorum Carmina," were grown myſterious

myſterious to the prieſts themſelves, who repeated them. And it can ſcarce be a wonder, that the French of Edw. I. time, in our old Statute Books, is unintelligible to any but Lawyers, even in paſſages excluding Terms of Art, when Scripture itſelf, if it was to be read before a country congregation in the firſt tranſlation of the Bible, would be as little underſtood, as if it was read in Greek. One can not help wiſhing, in this view, that both our Laws and our publick ſervice of Religion had been earlier uſed to our own Language; ſince, beſides by theſe means they would both have been more univerſally underſtood and admired; they would both at the ſame time have, in ſome meaſure, contributed to have fixed and preſerved the Language.

And

And yet, how great ſoever the abſurdity may ſeem, and how much ſoever to be lamented, that Laws which are made to be univerſally underſtood, have with us, for ages, been compoſed in Languages which, at moſt, none but learned men could underſtand, the fact itſelf does not ſeem difficult to account for.

During the unſettled times our country was long involved in, after the Conqueſt, the Language muſt neceſſarily have been in a fluctuating ſtate. In the period preceding the Conqueſt, the various inundations of thoſe Northern torrents, were enough to waſh away the remains of the Britiſh Language. And the reaſon why the Norman and the Latin tongues were preferred to our own, for the purpoſes of Legiſlation, after the Conqueſt, ſeems

to

to have been, that they were more ſettled, and, perhaps, almoſt as well known as what was left of the Britiſh.

1. As to the Latin, if you conſider the intercourſe our nation, for ſo long a time, had with the old Romans, and afterwards with the ſee of Rome; how the Canons and Conſtitutions of the Church were compoſed in that Language; and moſt probably publick worſhip at home; it will be eaſy to account for the uſe of that Language in reſpect to Laws. As to what you obſerved, that even deeds and private inſtruments were likewiſe in Latin, which ſeems more unaccountable; perhaps it might have been, becauſe ſo great a part of the lands were in the poſſeſſion of the Church, which conſiſted of men of learning, who might prefer this to a living one: eſpecially

cially ſince the Statute of Edw. III. by which, as all Records were to be made up in Latin, it might be thought as well worth while to have them ſo at firſt; and then, in caſe they ſhould be conteſted, leſs doubt could ariſe about the identity or meaning of the inſtruments in diſpute. And 2. as to the uſe of the French, in conjunction with the Latin, and for a time, in excluſion of it, the continental connections, from the moment after the Conqueſt, would be alone ſufficient to explain it, if we had not been told by hiſtorians, that the Conqueror uſed the utmoſt zeal and induſtry to propagate his own Norman tongue: and that too, in his particular caſe, from motives of ſound policy and good ſenſe.

Theſe reaſons, I think, may give light into a meaſure ſo ſeemingly repugnant

pugnant to general principles of policy, conſidered independent of our hiſtory; but I own to you, I am greatly ſurpriſed, that from the time of Edw. III. when the Parliament ſo nobly checked the uſurped dominion of the baſtard French (as the Norman Language has been called) in our Records, that no ſucceſsful effort ſhould have been made, or ſeemingly have been wiſhed for, to reſtore the Laws and all Legal Proceedings, to the general Language of the Country, from the reign of Ed. III. to the beginning of the late reign; except the momentary uſurpation of good ſenſe, (as I may call it) in one of Cromwell's ordinances to this purpoſe: an ordinance founded on juſt notions, well conſidered at the time, and fit to have been retained in after-times. Pity indeed that the Language ſhould have been, in any degree, ſent into exile,

juſt at the time when the legal Government was reſtored!

POLICRITES.

To tell you the truth, I have other objections to the ſtyle and phraſe of our Profeſſion, than what reſult merely from the uſe of the native or any other Language in its Proceedings. We are every day enlarging a collection of cant phraſes, which can ſcarce be called Terms of Art, or, at leaſt, are many of them of ſo modern a growth, that the abſurdity is, in a great meaſure, that of theſe times, and I do not know where it will end. Such are your "ſpringing, ſhifting, and reſulting Uſes, "Executory Deviſes, Contingent and "Croſs Remainders," and many others leſs authoriſed that would confound Lord Coke himſelf: not to mention your uſe of fictions, in contradiction to the

the common ſenſe of the World,—that the King never dies,—that the Term is one day, and ſuch like. If theſe were introduced only for the love of myſtery, or to amaze men with paradoxes, I could ſoon increaſe your collection. In the ſame equivocal ſenſe, one might ſay with Swinburn, a mother is no kin to her child; or that there is at this day, no ſuch thing as a religious man, or, indeed, as a villain in England. Theſe Jeu d'Eſprits would be full as manly as making "homo "ſtand for a woman, or mulier for a "man, perſons to be born to mean per-"ſons already born, perſons living to "mean thoſe not born, a King to ſtand "for a Queen, and even one particle "to mean another." But not to mention more of theſe, for theſe are trifles to much of the Language of ſpecial Pleading, ſo little known to any but

the Profeſſors themſelves, that many would as ſoon expect to get its meaning by conjuration, as that Patriarch of Venice once attempted by a word of Ariſtotle's.

EUNOMUS.

Several ſtrokes of raillery you have aimed at the Profeſſion, put me in mind of an anecdote I have met with in a book of travels; tho', I am ſure you do not mean to ſay ſo much. The ſtory is not an unpleaſant one, tho' you will own rather ſevere. St. Evona, a famous Lawyer of this Country, in the days of our early anceſtors, was piqued, we are told, for the honour of the Robe, that his Profeſſion ſhould have no Saint to patronize it, when almoſt every other employment had ſome pious perſon, whoſe memory every one of the ſame way of life might

might revere, and under whoſe good auſpices they might follow the ſame track. The Phyſicians, he knew, had St. Luke; the Champions had ſecured St. George to themſelves; and Muſic and Painting were not without their Tutelar Saint: but the Lawyers he found had none. The Pope, he was bound, as a good Catholic, to think could help him out in this emergency; ſo to Rome the good old man went: and requeſted his Holineſs to give the Lawyers of Britain a Patron. The Pope was not diſpleaſed with the requeſt; but puzzled how to grant it. The truth was, however the Roman Calendar was ſtuffed at that, or in later times, he could recollect no Saint who was not already diſpoſed of to other Profeſſions. What could his Holineſs do? The dilemma was diſtreſſing enough. Had he flatly told the old

man, he could not aſſiſt him; the Pope would have owned then, what no Pope ever yet owned, his Incapacity: had he taken the other ſide of the alternative, and offered him a Saint for his Profeſſion, who had already long been at the head of another; his Holineſs foreſaw our veteran Lawyer would have diſputed with him the validity of a ſubſequent grant of the ſame thing, while a former was ſtill in force elſewhere. Preſſed by this difficulty, his Holineſs acted like a good caſuiſt: and thought of an expedient that might at once be a ſalvo jure of his good nature, his want of recollection, and the Papal power. He propoſed to St. Evona, that he ſhould go round the church of St. John de Lateran, blindfold, and after he had ſaid ſo many Ave-Maria's, that the firſt Saint he laid hold of ſhould be his Patron; which the good old

old Lawyer willingly undertook.— When he had finiſhed his Ave-Maria's, (the Book ſays) he ſtopped ſhort, laid his hands on the firſt image he came to, and cried out with Joy, "this is our Saint, let this be our "Patron." But when the bandage was taken from his eyes, what was his aſtoniſhment to find, that tho' he had ſtopped at St. Michael's altar, he had all the while laid hold, not of St. Michael, but of the Figure under St. Michael's feet! The ſtory ſays, he was ſo dejected at the diſappointment, that he died ſoon after. And it ſeems to me ſtill open for you to argue, whether Evona himſelf had any authority to act for his Profeſſion? And whether he ſhould be deemed to have ever accepted the Patron?

POLICRITES.

I ſhall ſcarce ever make a queſtion of what I can never ſuppoſe. The Profeſſion may ſafely diſclaim ſuch a Patron; I truſt none of its members are bad enough to merit the imputation. But, if you would wiſh to anſwer my difficulties rather than deſert me, with me it has always been difficult to underſtand, how Pleading is neceſſarily involved with ſuch barbarous terms; and yet the art itſelf, ſo fenced by this inacceſſible jargon, is dignified by nothing leſs than the name of ſcience? Tho' I muſt not forget the Conveyancers, both artiſts often contributing to the glorious uncertainty of the Law. I do not know whether the blunders of the latter do not furniſh the other with the beſt half of his buſineſs: "words of limitation and

"words

" words of purchaſe," it muſt be owned, have been very good Clients in Weſtminſter-Hall; their pretenſions are generally left ſo very vague and ill-defined, that one rarely knows in favour of which to decide. However, the Pleaders are obliged to them.

EUNOMUS.

They are very little obliged to you, I think, for ſo partial and unfair a repreſentation. But inſtead of a flat denial, of all you have ſaid, in common form, I am ready in conteſting a point that has been ſo often perverted, fairly to take iſſue, and in the Language of thoſe gentlemen, " to put myſelf on " my Country."

POLICRITES.

" I do ſo likewiſe." But that you may not ſhorten your defence for want

of a charge, I here declare, that I, and every man in England, do complain; that whereas, we are true, pious, faithful, and honeſt ſubjects of this kingdom; thoſe dealers in form, do inſert both for and againſt us ſo many falſe, ſcandalous, words, without a meaning, and with ſenſeleſs repetitions to the damage of the ſaid perſons, very often of all they are worth. This is my *declaration*; and I give you leave beforehand, to plead as many ſeveral pleas to it as you will: for, I think, out of all together, you will ſcarce patch up a defence.

EUNOMUS.

You have expreſſed yourſelf rather in the ſtyle of an impeachment than a declaration, eſpecially as all the people of England are made parties to your complaint. And yet I do not at all

all doubt, what you have probably condemned without much thinking, you will have candour enough to admire upon more ſolid reflection.

I obſerve your raillery, in the courſe of our converſation, has been often pointed at forms of Law: and ſpecial Pleading has, as it neceſſarily muſt have in that view, enjoyed a great ſhare of that raillery, as you look on form to be of its eſſence. But becauſe I aim at a more general defence, I will drop that particular for a few moments, after reminding you, that one of its ableſt advocates is not blind to any real defects that have crept into it. Lord Coke himſelf often cenſures impertinent pleading. Theſe cenſures do give ſome little weight to your complaint; eſpecially as in theſe enlightened days, there has been even an ad-

dreſs in Parliament againſt ſpecial Pleading itſelf.

Forms in Pleading, of ſome kind, neceſſarily ſucceeded the old way of defence, that was made *ore tenus* at the Bar. In that caſe, the parties could beſt explain the nature and meaning of their defence; and the Court, in preſence of the parties, could ſay, whether that defence ought to be allowed. That method of pleading perſonally at the Bar, is ſtill retained, in a few inſtances; in the manner of ſuffering a common recovery, in counting on a Writ at a Serjeant's call, and in pleading to Indictments for crimes; and in Courts of Conſcience, for the recovery of ſmall debts. And though, in the general run of Civil Suits, it may, without examination, be thought the only remedy for diſpatch of juſtice; it muſt, in moſt caſes, and in an advanced

vanced State of Society, prove a great hindrance and diſadvantage to the Suitors in other reſpects. For that reaſon, it will be rarely found to continue in cauſes of value, in any civiliſed country whatever. The inſtances of this kind, one reads of in the Turkiſh dominions, may pleaſe us that it is ſcarce to be met with elſewhere. The oppoſite practice, in moſt countries in Europe, and the elaborate forms, appropriated to particular caſes, among the Greeks and Romans, ſhew the ſenſe mankind have of the neceſſity of written forms of proceeding in the due adminiſtration of Civil Juſtice. Nobody, I imagine, every thing fairly conſidered, would wiſh to have this method of perſonal Pleading, recalled in England. And yet, it is very plain, ſome kind of form immediately came in the room of this manner of defence, as a means of checking

checking the impertinence, and expence of telling long ſtories on Record, and of obtaining ſome kind of certainty in the grounds and meaning of the charge and defence ſet up. You will beſt underſtand what kind of forms are real and neceſſary, by conſidering the nature of the certainty the Law requires. This, I mentioned, will oblige me to depart a moment from the particular ſubject now under conſideration.

It will appear, I apprehend, inconteſtibly clear throughout our books, that the Law requires leſs nicety and exactneſs in a man's laſt Will, than in a Conveyance: and leſs in a Conveyance than in Legal Proceedings. The reaſon of which I take to be; that at the time of making a Will, the parties underſtanding is ſometimes preſumed to be impaired, and they are obliged

to

to act without proper aſſiſtance. And therefore, where there is power to come at the intention, Courts will do every thing they can to enforce it: becauſe a perſon in his Will diſpoſes of what is merely his own abſolute excluſive property; or ſo far only as it is ſo. But in Deeds (which are ſolemn acts executed inter vivos) the Law will require a ſufficient exactneſs; and legal powers to be expreſſed in proper legal phraſe. Becauſe they are ſuppoſed to be framed by the advice of Council: and it is neceſſary, if technical terms are made uſe of, to underſtand them in a fixed ſenſe; it is neceſſary too, for the credit of the Law, in order to avoid bad precedents, to overturn ſuch Deeds, as when conteſted appear to be informal and uncertain. But even here "Apices Juris non ſunt "Jura;" and Courts will not permit trifling

trifling Exceptions to avoid Deeds, becauſe the party has no remedy to have new. With more reaſon, greater preciſion was of old required in Writs, and ſtill more in Pleadings. For Writs, if abated, may be ſupplied by new Writs; and for the credit of the Law, what is likely to become immutable as a Record; and as ſuch, of that dignity as in point of obligation and intereſt to the parties, to take place of all inſtruments whatever; in point of precedent, to ſilence all mankind, ought in reaſon to be more exact than all other forms whatever.

But even in Legal Proceedings, tho' they are, or are likely to become Records, Courts will diſtinguiſh between matters of an amicable, and an adverſary nature; and will make ſome grains of allowance to the former, that they will refuſe to the latter. Lord Coke, I think,

I think, has told us, that they will not "pry with Eagles eyes into aſ-"ſurances of the Realm;" that fines ſhall have ſuch conſtruction as Charters, or other Conveyances, between party and party; and need not have ſuch a preciſe form as a Writ or a Judgment. From the ſame juſt principle of reaſoning, is derived that ſtream of indulgence, that flows in the capacious channel of thoſe ſtatutes made to remove exceptions to pleadings, for want of form, where the want of form could be no poſſible prejudice to the matter in queſtion.

After this ſhort, but neceſſary digreſſion, to ſhew what certainty the Law does, in general, require; I muſt now return to conſider the particular kind of forms you, with a great part of the world on your ſide, have ſo freely cenſured.

I ſhall be always happy in endeavouring to vindicate any part of the Engliſh Law, which I adore, from any plauſible imputations: and if it is really vulnerable in any part, perhaps it is principally in that you have now attacked. The few writers on Pleading, have never failed of making that paſſage of our maſter Littleton, to which you alluded, the motto of their performance: they with him, in their preface, call it a *Science*; but in their works (I allow) have either forgotten to treat it as ſuch, or have moſt miſerably miſtaken the nature of ſcience. I do conſider it as a ſcience; and in vindication of Littleton's notion, ſo groſsly perverted, will give you my reaſons why I think it ſo: but as your objection itſelf may be extended to other parts of our Law; I ſhall go rather further in my anſwer;

by

by ſuppoſing, in order to prevent, ſuch objections.

I ſhall take it for granted, that ſcience and demonſtration (which is the path to ſcience) are not confined to mathematical learning only. They are to be found, wherever certainty in our ideas are: they are, therefore, to be had often in the ſtudy of Morality, and conſequently in Law, which is founded on Morality. Demonſtrations in Morality are not, in every inſtance, ſo abſolute as in Geometry; becauſe this depends on external figures, unalterable in their nature, and independent of the mind: whereas, the other depending on the mind, muſt depend on the clearneſs and preciſion of our ideas; which muſt be communicated by words, but will as often be entangled by them. Nor, when I ſpeak of Morality or Law, as a ſcience, can

I be underſtood to mean, that all the truths they contain are ſo chained and connected together, as to be deduced from a ſingle propoſition, like thoſe of Euclid: that is not neceſſary to Science. Morality has been ſo treated, you will remember, but by no means to its advantage. A chain of propoſitions is as diſguſting on ſuch ſubjects, as the forms of Lemmata, Poſtulata, and Corollaries, ſo idly uſed on ſuch occaſions. And Leibnitz, who would have deduced all we know in a direct line from "cogito ergo ſum," was not, in my opinion, more ridiculous than theſe writers.

But Morality or Law are to be conſidered as *Sciences* in this reſpect: their principles are either ſelf-evident truths, or immediately deducible from them; and we may reaſon in every caſe from thoſe

thoſe principles, with certainty, clearneſs, and preciſion.

Nor will it be any reply to what I have ſaid, to aſk me why, if Law is a ſcience, does it at all admit of altercation; or is demonſtration on one ſide ſet up againſt a pretended demonſtration on the other, as in every caſe argued in Weſtminſter-Hall? Why too, is truth itſelf engrafted on error? Why do Lawyers (as you have urged) uſe fictions themſelves as principles; and inſtead of building on ſelf-evident truths, argue from the cleareſt falſhoods?

The anſwer to both theſe objections, is briefly this; that they are both of them the common practice in other caſes. But as to the firſt objection, the argument (if there is any) is drawn from the abuſe, which, in ſound Lo-

gic, you well know, concludes nothing againſt the thing itſelf.

1. In Morality as well as Law, intereſt will often get the better of reaſon: and men, who have a paſſion to indulge, or a right to diſpute, will, when byaſſed by intereſt, endeavour to maintain their ground againſt truth; and keep up a colour of argument, tho' they argue from falſe principles. But then in neither inſtance is ſophiſtry to be complimented with the name of demonſtration; neither Morality nor Law are to be degraded, becauſe they are abuſed. Beſides, as men in either caſe, are accountable to other tribunals than their own conſciences, a diſintereſted deciſion, in either caſe, will ſet every thing right in the end; will ſeparate truth from fallacy, and reſtore Science to its baſis.

2. Your

2. Your other objection is more plauſible, but proves too much. It proves, at leaſt, that Lawyers may be excuſed in arguing from fictions, if in ſo doing they do no more than what Mathematicians themſelves do. Thoſe converſant in the higher Geometry, know what uſe are made of mere approximations, where the concluſions, though ex vi termini, not ſtrictly true, are ſo near the truth, that they anſwer the ſame purpoſe. But to give an inſtance in Natural Philoſophy, within every body's reach, do but, in *Prior*'s Language,

——————— caſt your eye
At night upon a Winter's ſky,

and then tell me, whether you ſee any of thoſe bears, dogs, and ſerpents, ſo familiar to Aſtronomers? Every body ſees the groſſneſs of the fiction; and yet, you well know, how uſeful it is

to Aſtronomers. Will you, after theſe bold aſſumptions, rob the Lawyers of a few innocent fictions? Or impute as a crime to one ſcience, what has ſo nobly extended the boundaries of others? But the Law itſelf, in reality, is not anſwerable for all its fictions: we muſt diſtinguiſh. Some, indeed, are of its own creation; but others are the effect of time alone. To explain myſelf by ſome of your own inſtances: *that all lands are held of the King* — *that the King never dies* — *that the Term is but one day* — *that Jamaica*, or any other part of the world, *is ſaid*, in a declaration, *to be in the county of Middleſex* —are merely notions of Law, and of the genuine eſſence of fiction. But the terms *Benefit of Clergy* — *incurring Premunires* — the doctrine of *Common Recoveries* and *Caſual Ejectors* — tho' fictions now, were once correct expreſſions;

preſſions; are founded on former real practice; by courſe of time and accidents are greatly perverted from their original, but yet eaſily to be traced to a ſound natural meaning.

If then, this anſwer to your objections is ſufficient; and the notion, that the Law in general is a Science, is right; I will next conſider, whether that branch of it that is converſant in pleading, has not the ſame pretenſion to ſcience, that legal reaſoning, in general, ſeems to have. And tho', on this occaſion, I am council for Littleton, as well as the Law; I deſire Littleton himſelf may be heard: becauſe I principally intend to ſhew the juſtneſs of his obſervation.

—"Know, my ſon, (ſays this great "Sage in the book before us) it is one "of the moſt honourable, laudable, "and profitable things in our Law,

"to

" to have the ſcience of well plead-
" ing in Actions real and perſonal;
" and, therefore, I counſel thee eſpe-
" cially to employ thy courage and
" care to learn this."

Littleton's words are, in point of expreſſion, too plain to need any comment; I will only enforce them, by obſerving, that the ſcience he ſpeaks of has, at this day, ſome additional recommendation to its " being honour-
" able and profitable," that it is leſs troubleſome than it was formerly: becauſe, time has not only lopped off one of its branches, in the diſuſe of real actions; but improvements in the Law itſelf, have weeded it of many of thoſe quirks and chicanery that diſgraced this part of the Law, more than any other; and that ſo often in practice, ſet Littleton's epithets of " honourable" and " profitable," at variance

variance with each other. Witneſs the Statute of Q. Anne, for the amendment of the Law: and a hundred others allowing the general iſſue, and ſpecial matter to be given in evidence.

By pleading, I ſhall underſtand the entire ſtructure of a Record: comprehending as well the Plaintiff's demand, ſuited to the nature of the action and the circumſtances of his caſe, as the proper anſwer of the Defendant to deſtroy that demand; with the ſubſequent ſteps ariſing from theſe, till the Record is brought to ſome iſſue, either of Law or Fact.

Now with reaſon and common ſenſe for your guides, would not you, in framing any demand at Law, conſider what is to be alledged, and what can be proved? For in ſuing either for a right detained, or a wrong committed, the Plaintiff is to recover by his own ſtrength,

ſtrength, and not by the Defendant's weakneſs. And if, in point of prudence as well as juſtice, he ought to demand no more than he can prove; in point of general convenience he ought to demand it, with that certainty and preciſion, (as to time, place, perſons, &c.) that the Defendant may know how to anſwer the demand; and a third perſon, an entire ſtranger to both, ſitting in a Court of Juſtice, may know how to judge between them. This, I take it, is the eſſence of a *declaration* in the abſtract: it is common to every form; and without which no form of a declaration is perfect. And tho' the wiſdom of the Law, has invented different forms of Actions for the recovery of different Rights; you will find, that the ſubſtantial part of any declaration, is, as to its great outlines, what any perſon of good ſenſe would moſt

moſt probably put together in a demand of that nature.

POLICRITES.

But though declarations of Trover, Detinue, Treſpaſs and Caſe, have each their proper forms; why, if your poſition is true, cannot a plain, juſt narrative of the circumſtances of fact, be ſufficient of itſelf; and the bare ſtate of the caſe be its own form?

EUNOMUS.

I can only anſwer, that this might do very well for the few who are endued with uncommon good ſenſe; but is not the eaſieſt and moſt direct way for the generality of people, who would never be able to tell their own ſtory on Record, in a ſmall compaſs. I will add, that forms, of ſome ſort, are the

conſequence of any thing becoming an Art: what do we mean by an Art, but a collection of certain rules for doing any thing in a ſet form? I will add too, that theſe forms are more conciſe and convenient in themſelves, than any one general form can be. I beg you would remember, I am not ſhewing you the manner of pleading; but that pleading is a ſcience: nor ſhall I, in any one inſtance, pretend to tell you what ought or ought not to be pleaded; but I am to maintain, that in any inſtance whatever, where the pleading is good, it is reducible to plain principles of common ſenſe. This conſideration, tho' it will not, in a moment, convey into your head all thoſe forms, that nobody, I ſuppoſe, is born with, but acquires by long application and experience: yet will it teach you how to judge of thoſe forms; how to examine the pro-

priety of thoſe exceptions, to be met with in our Report-books, and the opinions given in thoſe caſes; in ſhort, it will prevent your being miſled by form in oppoſition to common ſenſe, or without ever conſulting it.

The Defendants plea or anſwer to the declaration, (which, tho' only one part of this branch of learning, has by accident given name to the whole) is the moſt difficult and complicated part. It muſt be grounded as well on the caſe the Plaintiff makes, as his own: and therefore, in the ſimpleſt view, a Defendant muſt either except to the manner in which the Plaintiff makes his demand, or he muſt anſwer it. Again, in anſwering, he muſt deny the fact alledged againſt him, or juſtify the doing it. To ſhew you this idea is not a refinement of modern Theory, I will appeal to antient

tient Rome. Tully, in his Milo, you remember, ſeems to have conſidered this as the only method of treating a charge—Vidit in confeſſione facti, juris tamen defenſionem ſuſcipi poſſe—and again, Cum eſſet controverſia nulla facti, juris tamen diſceptationem eſſe voluit.

POLICRITES.

That a perſon, when he is charged with having done any thing, muſt either deny or juſtify the fact; I readily grant: but your modern way of doing both, puzzles me extremely to account for. And it will be as eaſy for you to quote Tully in vindication of that method, as to make it ſcience. Euclid often ſets out with ſuppoſing, that a propoſition is true or not true: but he never ſuppoſes both. The conduct of your Pleaders in this caſe is, to me, worſe

worſe than the moſt perfect ſcepticiſm. I know nothing that reſembles it, but Mr. Bayes's dance in the Rehearſal. Firſt his troops are dead; then they are not dead; then it is doubtful whether they are dead or not. An abſurdity this, in point, to any common caſe, (of an aſſault and battery for inſtance,) where a Defendant firſt ſays, he did not do the fact charged; then he ſays, that he did it in his own defence.

And then, tho' I ſhould admit the neceſſity of different forms in declarations, I have much to object to what you, no doubt, will call words of courſe, ſuch as colour, inducement, and all that kind of ingenuity with which Pleaders varniſh over the flaws of their manufactures. Why, for inſtance, becauſe I have reflected on a perſon's character, and am ſued for it,

in an action for words, is he, at the very time he complains of ſuch an injury, to do me (and what is more, to be authoriſed in point of form, to do me) a much greater injury in the ſame way? Why is he to repreſent me as one of a malicious, diabolical diſpoſition, and intending totally to ruin him? Why, when another knows he ought only to alledge what he can prove, is it a neceſſary form for him to ſay, I beat him with ſticks, knives, ſtaves, and endangered his life; when, perhaps, if I did any thing, I only gave him a puſh? It is the doctrine of Pleading, that ſuch things are not traverſable, becauſe immaterial: if they are immaterial, for that reaſon they ought not to be alledged. As for the giving colour to Pleadings; it is what has frightened ſome from the Profeſſion itſelf; I need not add, it is enough

to

to diſcredit the Profeſſion in the opinion of others.

EUNOMUS.

I muſt again repeat, I neither propoſed to teach the rules of Pleading, much leſs to vindicate the real imperfections, and abuſe of it. It is not a reflection on the ſoil itſelf that weeds grow up with the fruit: it is on thoſe who neglect its cultivation. Moſt of your objections are old, and carry with them the marks of decay, as well as of age. There is leſs room for them now than ever: at leaſt, I will maintain, Pleading was never treated more as a ſcience, than it now is from the Bench; and that in its conſequence muſt make it be ſo at the Bar. The more ſtrict the aſſay is likely to be, the purer will the coin be ſent from the Mint. And in fact the ſpecial Pleaders are not

now the recluſe beings that you ſuppoſed them, in the beginning of our converſation, "people who furniſh "the language of courts without ever "being ſeen there themſelves;" but many of them, men of the firſt abilities and moſt extenſive practice; who, if their inclinations or other engagements to the public would permit, might introduce their own ſcience into the world in a manner that ſhould ſatisfy every friend to ſolid learning, and ſilence every cavil and objection.

But as we are yet to look for any work of that kind upon this ſubject, I will endeavour to relieve you at preſent by obſerving, that as to the goodneſs of pleading, this ſcience, like every other, has its axioms; certain eſtabliſhed maxims, which influence the whole, and with which all parts of the ſyſtem muſt be conſiſtent.

A Declaration, in general, we may venture to ſay, will be good, if the Demand itſelf is well grounded, the form of Action rightly choſen, and the circumſtances of the Caſe expreſſed with ſufficient clearneſs and certainty. A Plea, in general, will be good, if it is a certain Legal Anſwer to the Declaration.

To be more particular: the firſt fault in Pleadings is fatal; and the declaration is the ground of the whole. So that, if the demand itſelf is faulty, tho' the Plea is equally ſo, the Plaintiff muſt in reaſon be the loſer: for no matter what is the weakneſs of a fortreſs to thoſe who are ſtill too weak to attack it.

To have the demand unexceptionable, there muſt be a legal right of action, and the proper courſe of remedy. The caſe muſt be expreſſed with

perſpicuity and preciſion: and hence the neceſſity of many Counts or different ways of laying the caſe in a Declaration. Hence, too, matters of inducement are laid; it is a general rule, theſe are not traverſable, becauſe they are not material to maintain the charge, but to inform the Court how the demand aroſe. For this reaſon, they need not be averred; but every thing material to be anſwered, ought to be averred.

Then, as to the Plea, (conſidered, I mean, at preſent, as an anſwer, not as an exception, to the Declaration) it muſt be either a direct denial, or a direct excuſe. Conſidered as a denial, it muſt not ſet out matters which do, in effect, amount to the general iſſue, but muſt ſet out the general iſſue itſelf: for every body ſees, the latter brings the Record to the very point at once, which,

which, after all, in the other caſe it may come to, tho', poſſibly, not till it has been ſwelled and entangled with Replications, Rejoinders and Surrejoinders. A Plea muſt not contain matter of argument or inference, but a poſitive aſſertion. It muſt not contain departures; or traverſe what is not alledged in the Declaration. It muſt not be double, but reſt on one ſimple point of defence. A Defendant, at this day, by leave of the Court where the Cauſe is depending, may plead ſeveral matters in his Defence, but not make a Plea double. The antient way, ſtill uſed in many caſes, to avoid duplicity in a Plea, is, firſt, to proteſt any matters charged are not true; and if true, by way of Plea, to juſtify. This form of Pleading admits, you ſee, of but one diſtinct iſſue; either upon a proteſtation or the Plea. After

all, when the contents of the Plea are ſettled, it muſt be right in its concluſion; that is, in proceedings, by original writ, it muſt, as the caſe requires, conclude, either to the Writ or the Declaration: and in this ſenſe only, I take it, is to be underſtood the maxim, that the concluſion defines the nature of the Plea. And in every caſe a Plea muſt conclude, either to the Court or the Country, as the matter contained in it is properly cogniſable by the Court or a Jury; and, therefore, tends towards a demurrer or an iſſue of fact. If I am not perfectly intelligible to you, or have been under miſtakes myſelf in what I have advanced, as there is too much reaſon to fear, I hope the difficulty of the ſubject will excuſe me.

The ſtructure of a Record, raiſed on theſe foundations, is not leſs ſolid than the demonſtration of a propoſition in Euclid:

Euclid: and Pleading, formed on theſe maxims, is not only matter of *ſcience*, but, perhaps, affords ſome of the beſt ſpecimens of ſtrict, genuine Logic.

I know it is the want of adhering to theſe maxims, that will, after all, be urged by men of ſenſe, as the great objection to ſpecial Pleading. A navigation, often difficult in itſelf, and always made dangerous by bad pilots, has made many wiſh that the courſe of the voyage was entirely changed! This view, probably, induced the Legiſlature to authoriſe the general iſſue in many caſes, and permit the ſpecial matter to be given in evidence. The ſame view, probably, occaſioned an application to the Legiſlature, at the time one great reformation in the Law was made by putting Pleadings into Engliſh, to aboliſh, at one ſtroke, all ſpecial Pleading whatever. That part of the petition,

tition, we know, was barely left to ſtand on the Journals, and never was made part of the Law.

Others have wiſhed to compaſs the ſame end, but to obtain it by different means: to have the advantage of the general iſſue in all caſes; but in all caſes to have a note of the true point, meant to be inſiſted on at the trial, given to the other party or his attorney; to have that very point found in terms by the Jury; to have it endorſed on the Poſtea; and Judgment given on the point. This method, it has been thought, would be ſufficient to prevent ſurprize on either ſide; would prevent, at the ſame time, all the inconveniences ariſing from the intricacies of Pleading, and yet make the Record particular enough, to ſet up one verdict, unimpeached, as a bar to another trial on the ſame caſe. I ſhall only obſerve, as

to

to the method itſelf; that there is ſomething analogous to it already ſubſiſting in practice, in the caſe of an indictment for Barretry: which offence conſiſting of divers acts, in diſturbance of the common peace, a general charge is allowed to be ſufficient on the indictment; and in lieu of the particularity ſo favourable to the Defendant, and on that account, that he may not be ſurpriſed, ſo agreeable to the general policy of the Law, a note of the particular matters intended to be proved is given to the Defendant at a convenient diſtance of time before the trial.

But whether ſpecial Pleading would, in point of ſaving time or expence, be better reduced or not; or whether this method would be effectual or not, are points, about which, I take not upon me even to hint an opinion. I am content to inſiſt, that Pleading is, in

in its own nature, a *Science:* and that in all caſes, where the ſkill of the draughtſman itſelf is not deficient, the outlines may be truly and regularly drawn.

Thus, my Friend, have I preſumed to vindicate this copious and difficult ſubject from thoſe imputations, which I ſhall not ſcruple, now, to call, rather the cavils of prejudice, than the attacks of truth. If it really wanted defence, I am conſcious, it muſt have looked for it elſewhere; I am too little verſed in the excellencies of the art, to have ſet it in a fair and proper light; and yet too well affected to the Law in general, to ſuffer raillery to paſs for argument, and the honours of a victory, to be aſſumed without even the merit of an engagement. Am I to infer, from your ſilence, that your attention is only wearied, or that your objections

jections are, at laſt, exhauſted? However, I think it high time to know your mind, and I will call upon you in the words of the Poet.

—— dede manus, ſi non accingere contrá.

POLICRITES.

§. 7. A compleat ſurrender, I fear, you muſt not expect; I am ſo far aware of your ſtrength, that I think it good generalſhip to reſerve my fire; and permit you to flatter yourſelf, that you have ſilenced the battery in that quarter, that I may open it with more ſucceſs in another.

And beſides, many of the objections, laying as ſtrong againſt the forms of Conveyancing, as againſt thoſe of Pleading, and which, therefore, I ſhall not repeat; the former has enough of its own, attended too with more fatal conſequence in this caſe, than in the

the other; and of a more extenſive, as well as more pernicious influence. Very few, in a ſociety, (comparatively ſpeaking) perſecute their ſpecies, or are perſecuted in Courts of Juſtice: conſequently, few ſuffer by Nonſuits, Demurrers, and Arreſts of Judgment. But every one, in his turn, that has any property at all, buys or transfers an eſtate, marries and dies. And, therefore, every one in his turn, either in himſelf or his poſterity, may be a victim to the Conveyancer: as he may be harraſſed by his Deeds of Purchaſe, his Will, or his Settlements. And yet, here, I ſuppoſe, Practice is to be dignified, at leaſt, with the name of an Art, as before it was called a Science: as I ſhall, doubtleſs, be told one has its Rules as well as the other its Principles. And one of its rules, no doubt, is to be as prolix, and full of

tautology as poſſible. The credit of which obſervation I, by no means, take to myſelf: it has been made, at leaſt, a century ago; but, I ſuppoſe, does not loſe ſtrength at this day. One of our Legal Antiquarians, I remember, in a kind of funeral Eulogium on the Saxon ſimplicity, ſo long ſince dead, obſerved, that even in his time "*an acre of Land* "*could not paſs without almoſt an acre* "*of Parchment.*" He would have obſerved at this day, that a flock of ſheep is often converted into a Settlement. Virgil's Carthaginian Queen was immoderate as well as fraudulent, in cutting the thongs into parchment, to incloſe the purchaſe[a]. Our moderns are rather more moderate, as they ſeem

[a] Alluding to the tradition hinted at in theſe lines:

Mercatique ſolum facti de nomine Byrſam
Taurino quantum poſſent circumdare tergo.

Æn. I. v. 371.

ſome-

ſometimes to bargain for no more land than they can cover with the uncut parchment that conveys it. If Somner, however, a grave antiquary, could indulge in the obſervation juſt mentioned, we may eaſily forgive the comic humour of the Poet, who makes Hamlet remark, "that the very Conveyan-"ces of a man's Land would hardly "lie in his coffin:" and if all this maſs of verboſity ſhrinks, at laſt, to little or no meaning, I may well continue and apply the dialogue of Hamlet and Horatio, to our preſent ſubject.

HAM. Is not parchment made of ſheep-ſkins?
HOR. Ay, my Lord, and of calve-ſkins too.
HAM. They are ſheep and calves that ſeek out aſſurance in that.

EUNOMUS.

§. 8. I fear no human ties will give the "aſſurance" you ſeem to expect. In vain

vain do we blame Civil Contracts for the want of a Security, which is ſcarce to be had from Laws themſelves: The adequate compliance with a Law, or the performance of a Contract, muſt ſtand a little indebted to moral honeſty; or the penalties will not protect the one, much leſs will the parchment the other. And tho', in many caſes, there is no intention to evade either a Law or a Contract, there may yet be a difficulty to underſtand them; a difficulty in both, ariſing from the unavoidable ambiguity of Language: and in Conveyances, very often increaſed by the circumſtances and condition of the Parties. Your objection, therefore, (to treat it ſeriouſly as you began) proves a great deal too much: it is, in ſome meaſure, founded on the imperfection of human nature; which, ſurely, will affect and perplex other

human Acts, as well as Conveyancing. But this unavoidable obſcurity, which is imputed to Conveyancing as one defect, is, in reality, the cauſe and, I may ſay, the parent of the other: Deeds are, therefore, made prolix that they may not be obſcure. The verboſity you complain of, ariſes from the anxiety of the Parties, that their meaning may be fully expreſſed; that as little as poſſible may be left to refine dconſtruction; and no loop-hole for evaſion. And thus, in the common compariſon of words to the leaves of trees, tho' thick leaves do ſhade the fruit too much from the ſun, yet they, at the ſame time, defend it from blights. I do not, however, pretend to inſinuate, that the length of Conveyances, is not often unwarrantably licentious; I only mean to anſwer in general, what you object in general.

And it will ſtrengthen this anſwer, as well as meet with another part of your objection, that flows from a compariſon of the preſent age, with thoſe far back, if we are a little more particular on this ſubject. The ſubject itſelf is indeed very extenſive: and you did not greatly exaggerate, when you ſaid, every body made a Purchaſe, a Will or a Settlement. As all property may be conveyed, it is evident modes of Conveyancing muſt depend on the nature and modes of Property, and are co-extenſive with them. I will, therefore, very ſlightly, conſider the ſubject in this order. Firſt, I will attempt a ſhort hiſtory and general ſketch of Property in its ſeveral ſucceſſive ſtages, comprehending ſome of its lateſt regulations by Law. I will next conſider the alterations in Conveyances, depending on the ſtate and alterations of Pro-

perty. After which it will be neceſſary to deduce the alterations in Conveyancing, introduced by Law; and, very ſhortly, to obſerve what are the now great prevailing modes of Conveyancing. Laſtly, I ſhall enquire, whence ariſes the confuſion in forms of Conveyancing. In going through all this, the leaſt I can do to reward your patience, is to give you free liberty to interrupt me as often as you pleaſe, to ſtart your objections, and make your replies.

POLICRITES.

I wiſh you may not repent of your conceſſion: however, the vaſt tract of time you are about to comprehend will be my apology.

EUNOMUS.

I ſhall not ſcruple to ſet out ſo far in your favour as to take the ſubject

up no higher than the Conqueſt: and even for a long while after, we are too deſtitute of particulars to be at all nice in fixing dates or diſtinguiſhing periods. It is ſufficiently evident upon the leaſt recollection, and I will venture to aſſume it as an axiom, that for many ages, "the property of the "whole kingdom was comparatively "very ſmall in itſelf, and in very few "hands." The riches of the nation aroſe almoſt entirely within itſelf; and England, conſidered as a reſervoir, was, with reſpect to its foreign engagements, rather emptied than ſupplied from other quarters: for Wars were attended rather with expence than plunder. And the other great external reſource to a kingdom, that of Trade, for a long time did hardly exiſt. The Riches of this Country, at the times we allude to, aroſe principally from the

produce of its Land. And from the great and even diſproportionate tracts of Moors, Heath, and uncultivated Land that we ſee even at this day, we may reaſonably infer an infinitely greater formerly; when the Foreſts Laws prevailed and engroſſed ſo much of the ſurface; when the reſt of the ſurface was employed only according to the mean ſtate of Agriculture in thoſe days. And then in how few hands was even this property? The Church (comprehending the monaſteries) we are told had about a third part of it; and the reſt was parcelled out, according to the military idea of thoſe times, among the great feudal Lords, who by their immenſe accumulation of property were only enabled to rebel againſt their Sovereign and impoveriſh their fellow-ſubjects: for the Public, comprehending the Bulk of the People,

People, excluſive of the Church and the Nobility, were either Mechanics and Artiſans, that from the nature of their trades and their tenure muſt have lived from hand to mouth; or Feudal Tenants in the melancholy ſeries of Vaſſalage down to perfect Villainage. Nothing can take off from the deformity of this proſpect, but the faintneſs it acquires from the diſtance at which we now view it. If you would at once change the ſcene, and as it were contemplate day-light without obſerving thoſe intermediate diminutions of ſhade by which it is gradually ſeparated from darkneſs; we muſt at leaſt paſs on to the reign of Henry VII. if not to that of Elizabeth, before we can have any comfortable view of the Arts, Commerce and Riches of the Kingdom. We ſhall then find a vaſt increaſe as well as a diffuſion of Property: it was

then principally that England was connected with and began to be ſupplied from every part of the habitable globe; it was then that every individual was enabled by his own induſtry to acquire property, fixed in its nature, and free in its diſpoſal. It is enough, in ſpeaking to one not a Stranger to the Law and Hiſtory of his Country, to refer, in proof of what I advance, to the great Conſtruction on the Statute of Intails, the Diſſolution of Monaſteries, and the Statute of Wills. All theſe concurred to open a free Alienation of Property; as Commerce and the Diſcoveries which it produced, did to increaſe it. Not that, I think, the political baſis was broad enough to raiſe the importance and riches of this Country to its juſt and full grandeur, till a greater increaſe of Commerce ſerved to animate the Spirit of the Times; and

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at the ſame time that it increaſed the Riches of England, made the Riches of England in a manner thoſe of the reſt of Europe.

When from that time to the preſent you glance ever ſo lightly back on the abolition of the military tenures with all their train of ſervices; the new ſpecies of Taxation that ſprung up out of their aſhes; the introduction of public funds that took its riſe from the emergency of the public, and that in its conſequence has produced, and will neceſſitate the continuance of other funds; tho' let me obſerve a wiſe miniſter to keep this flame alive now and then ſnuffs the wick inſtead of perpetually demanding oil; prudently reduces the debt in order to preſerve the credit. Add likewiſe the eſtabliſhment of the Bank and commercial companies; the ingenious, and to certain limits,

mits, uſeful ſubſtitution of paper currency for caſh; the analogy that inland Bills have been made to bear to foreign Bills of Exchange in their negotiability and legal protection; and the coincidence of all theſe in forming a new ſpecies of property; when I ſay you have ſurveyed all theſe in your mind, you will have before you a ſketch extenſive enough for our preſent purpoſe, of the general State of Property; from whence you will collect, that it has been in the courſe of time more widely diffuſed, as well as prodigiouſly increaſed, as to the modes and quantity of it.

Its having ſubſiſted in ſo many new modes, and its being ſo widely diffuſed, are circumſtances that directly lead us to the conſideration of Conveyancing. The forms uſed in early times, you will remember, were few and ſimple: for which it will be ſufficient

ficient to have recourſe to *Weſt*, *Madox*, and ſome other compilers of antient Precedents; tho' the Draughts in thoſe Collections, I own, are on ſo ſmall a Scale, that thoſe of later ages will appear too large and diſproportionate: but I leave you to your own reflections on that head, and will go on as I propoſed.

§. 12. And in order to keep within moderate bounds on ſo large a ſubject, let us diſtinguiſh as well as define.

By Conveyances, I would be underſtood to mean at preſent, written Inſtruments of private Perſons, diſpoſing of Property. This ſeems the moſt extenſive notion of the ſubject: it has on the other hand its own limits, and even thoſe muſt be reduced in this Enquiry.

It is obvious from this definition, that there are numberleſs written Inſtruments

ſtruments that by no means fall under the notion of Conveyances.—Such are Certificates, Rules or Orders of Courts, Writs and Commiſſions, and various other Public Acts. Theſe are all written Inſtruments; but they are neither Inſtruments of private Perſons, nor do they diſpoſe of Property. There are likewiſe other written Inſtruments which are in part included in the definition; and have a neceſſary relation to Conveyances. They do diſpoſe of Property, but they are not acts merely of private Perſons. They are not therefore in the preſent notion Conveyances; nor indeed in legal parlance have they been deemed ſo, but are called "Aſſurances of the Realm." They are Acts of Court as well as Acts of the Parties: or rather Acts of Court intended to ſupply the defects, ſtrengthen the operation, and preſerve the

the memory of what are in their own nature mere Acts of the Party. Such are ſome private Acts of Parliament, Fines and Recoveries. All which it is ſufficient only to mention; their not being in themſelves properly Conveyances will warrant our diſmiſſing them at preſent.

By this definition too I would be underſtood to include a Deviſe or Will as ſpecies of Conveyances; though I know in common propriety a Will and a Deviſe are not only with reſpect to the different nature of the property they diſpoſe of diſtinguiſhed from each other, but as acts that do not operate till he that made them ceaſes to exiſt, are always in treating regularly on ſuch ſubjects oppoſed in a ſtrict ſenſe to Conveyances. But ſo general a view as we are about to take will not endure this preciſion. They

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are both written inſtruments of private perſons diſpoſing of Property, they are both therefore Conveyances within the very letter of the preſent definition.

§. 13. Change of Property ſeems very early to have been accompanied with ſome written evidence to ſubſtantiate the transfer. The ſuperior uſe of written agreements to thoſe made only by word of mouth ariſes from writing being in its nature better able to keep in the memory of the parties themſelves the particulars of their agreements; and from its affording the beſt evidence for others to judge of the right of Property in caſe the claim ſhould be conteſted; or where thoſe who were privy to the making the agreement are not to be had.

No doubt of it the parole transfer was the original form of alienation;

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as it is eaſy to ſuppoſe the notion of Property, and the variations incident to it, to have been much earlier than the date of letters. The purchaſe of Sarah's Burying-place, in the twenty-third chapter of Geneſis, is a very early and beautiful inſtance of the ſimplicity of the primitive times. And the great weight our Saxon Anceſtors attributed to ſimple livery is better known to us than their forms of Conveyances. To this day indeed, in many inſtances, the greateſt intereſt in lands may be paſſed by mere livery and ſeiſin. But thoſe changes of Property are neceſſary objects of Conveyancing where there is nothing for a corporeal inveſtiture to attach upon; or, in other words, and more artificial language, what "does not lie in livery "muſt lie in grant."

§. 14.

§. 14. Should you aſk me concerning the nature of particular forms, as well as of the ſeveral kinds of Conveyances, their hiſtory and their origin; the dread of prolixity would make me rather prefer the riſk of being obſcure to be ſure of being conciſe. This conſideration makes me gladly paſs over the general or accidental ſtructure of the deeds I am after to mention; with the various forms of dating, executing, and atteſting.

I ſat out with obſerving, that the alterations of forms in Conveyancing have depended much on the various alterations of Property itſelf: but alterations of the modes of Conveyancing have been introduced independent of new modes of Property: and this either 1ſt by Laws introducing new forms — as Bargain and Sale enrolled — Covenants to ſtand ſeized to uſes

uſes—Aſſignments under the Bankrupt Laws, &c. or 2. by Laws requiring new circumſtances affecting forms that had a prior exiſtence: ſuch as the atteſtation of Wills—and the influence of Stamp Acts upon Conveyances in general.

§. 15. The forms of Conveyancing that prevail at this day are but few: but even theſe as to their origin I think ſtand in no very favourable light. For I ſhall not ſcruple to ſay, much of the Conveyancing now in force was originally the offspring of fraud and evaſion.

A certain mixture of pride and indolence (the former being the conſequence of riches having produced power; the latter employing power alone to increaſe the fund inſtead of the induſtry that firſt raiſed it), have in all times of our hiſtory made men

affect a fondneſs for *Perpetuities*; and labour with anxiety to introduce and protect them. And this will appear to have been the caſe, both as to individuals, who by means of great eſtates have neceſſarily been as great in power: and in bodies of men, who being poſſeſſed of great ſtock in common among one another have as naturally aimed at getting as much as they could into their own hands, and conſequently taking it out of thoſe of the Public. Had theſe attempts ſucceeded, you ſee by confining Property, the current of Conveyancing at length would have been ſtopped. And yet it is evident this art muſt have been miniſterial for a time, tho' it was in conſequence of the ſucceſs of its ſervice to have been diſcharged for ever. And this we ſhall find to be the truth.

The

The individuals who have made the greateſt efforts towards Perpetuities were the Feudal Barons of old. The Statute de donis in a manner created Perpetuities: for the books often ſpeak of Eſtates Tail as they may by poſſibility laſt for ever. The Statute de donis Lord Coke expreſly ſays, eſtabliſhed a Perpetuity for all who had or would make it; by force whereof (he adds) all the Eſtates in England were entailed. It was high time, you will ſay, when we come to reflect on the inconveniencies of ſuch eſtates, that the Nation ſhould be in ſome meaſure alarmed at the conſequences, and check them in their birth. This they attempted to do it ſeems by divers bills brought into Parliament to reſtrain Eſtates Tail. But who could ſuppoſe the Barons (as it were by an Act of Suicide) would vote againſt themſelves?

It is much eaſier to imagine, what Lord Coke tells us was the caſe, that theſe bills were always rejected. And in this manner Perpetuities continued for 200 years, till the Common Law in a manner was rouſed from its lethargy; and the Judges found that they could effect, by conſtruction of a Law in being, what had in vain been attempted by particular Laws framed for the purpoſe. And in the ever memorable period of 12 Ed. 4, the Judges reſolved, that by a Common Recovery the Eſtate Tail might be barred. Weſtminſter-Hall has ever ſince maintained its ground, and routed even the moſt circuitous attempts to reſtrain Recoveries in favour of Alienations. This was the greateſt effort that ever was made by individuals to introduce Perpetuities. The new-fangled doctrine

of Truſt-Terms has now and then furniſhed ingenious men with opportunities of contriving ſettlements that look'd this way; but the Courts have been always too much on their guard to let them prevail. And from the Will of the Duke of Norfolk, to that of the late famous Duke, however the ſubtilty of human wit has been exerted in this field of ingenuity; good policy ſo materially affected by it has always got the better in the end.

But the other ſpecies of Perpetuities I alluded to, aimed at by bodies of men, has not only been checked, but good has been made to ariſe out of evil. And that ſtream, which had it been ſuffered to be dammed up, would have deluged part of the Land, while it deſerted the reſt, by the Law providentially forcing it a channel, became the cauſe of general fertility. It

is to the attempts however of this latter kind that we owe much of our modern ſyſtem of Conveyancing.

The alienations in Mortmain, Lord Coke ſhews, in the progreſs of its refinement, introduced leaſes for long terms of years: which till the time of Ed. I. were very ſhort, and of no conſideration. And it is in this view only that we can account for leaſehold intereſts being ſo long incapable of giving the legal qualifications in various inſtances, they have ſince been allowed to impart. It is now every day's practice (however a plain man may laugh at it) for creatures, whoſe being is as a ſpan, to talk in their writings "of a thouſand years as of "one day."

The ſame views of Mortmain ſhewed the way to colluſive fictitious Recoveries under a pretended title. It

was

was this armour, forged by fraud, that has in the hands of the Law been ſo powerfully turned againſt fraud itſelf; and been happily found, as I have mentioned, to be the effectual way of preventing the other kind of Perpetuity, tho' it was deſigned to ſtrengthen the Perpetuities in Mortmain.

The ſame views of Mortmain too firſt deviſed Conveyances to uſes. Thoſe uſes which afterwards grew up and ſpread ſo wide during the conteſt of the Houſes of York and Lancaſter; which were at length modelled by the famous Statute; and were the origin of our modern Jointures. From theſe uſes likewiſe ſprung the doctrine of Truſts; which at firſt (and in the Statute I ſpeak of) were diſtinguiſhed from uſes in name only: and now are nothing more than uſes not executed by the Statute, as Uſes are Truſts

within them. The Statute mentions them both as ſynonimous: only as the proviſions of the Statute were not co-extenſive with the practice that had been connived at long before; ſuch *Uſes* as were not provided for by the Statute were left to their former channel of juriſdiction; and became diſtinguiſhed by the name of *Truſts*. And theſe Truſts are ſtill one of the principal objects, as they were originally the cauſe of eſtabliſhing the great Court that has the excluſive cognizance of them.

The introduction and progreſs of Uſes, beſides being thus the means of forming a fair and ſolid union between Law and Conſcience, in making the latter ſupply the rigour ariſing from the preciſion of the other, till both compleated the true line of Juſtice, and the real intention of the parties

in

in their agreements, contributed very much in the end to the improvement of the Law itſelf. For the many ſucceſsful attempts of diſpoſing to a uſe in the party's life-time of all future profits of lands, when he could not diſpoſe of the lands themſelves by any act to be in force after his death, probably opened the way much eaſier to the introduction of Wills themſelves: tho', as I have more than once hinted, the wealth and freedom of the times were ſufficiently ripe for this mode of alienation, ſome time before it was eſtabliſhed by Law.

From the premiſes I have now laid before you, it is not too much to conclude, what was aſſumed in the obſervation, that the ſpirit of innovation, and even of fraud, have in the end been the parents of public utility. And later times that have adopted

theſe

theſe inventions as a regular part of their ſyſtem, may even now commend the Authors, as the Rich Man in the Goſpel *did his unjuſt Steward, becauſe he acted wiſely*; that is, becauſe the policy of his conduct was in conformity to his principle, bad as his principle was in itſelf: but the proſtitution of abilities to evade the Laws of one's Country, however ingenious and ſubtle the means are, no good man will even think of commending.

§. 16. After this excurſion into the origin of ſo large a part of our preſent ſyſtem, a minute detail of the leſſer parts would be leſs excuſeable; indeed the anecdotes themſelves are few and thinly ſcattered in our books. It is ſaid, if I recollect, that Executory Deviſes, for inſtance, came in about Queen Elizabeth's time: perhaps it is more correct to ſay the legal

toleration of them began about that time; for tho' they have a ſmall tendency to perpetuity, and are deſtitute of that certainty of Intereſt the Law has required in paſſing Eſtates; yet they had obtained in ſo many inſtances, and the real inconveniences were found comparatively ſo few to what the overturning ſo many Wills in oppoſition to this practice would have produced, that it ſeemed neceſſary to admit of them to a certain limited degree. Not but that this form, which an indulgent admiſſion meant as a kind of boom croſs a harbour, to preſerve the veſſels already lodged there, has by its dangerous ſtructure in many inſtances, prevented others from ever arriving there, and has often overſet the Teſtator's intention, it was contrived to preſerve. Sir Orlando Brydgeman and Sir Francis North, we are told, were

were the Patrons and Founders of a very uſeful expedient in all Family Settlements, that of Truſtees to *preſerve contingent Remainders*. And the Books have handed down Sir Francis Moore, who flouriſhed about the middle of King James's Reign, as the firſt practiſer of a form of Conveyance, which has now almoſt abſorbed every other as a ſubſtantive form, that of *Leaſe and Releaſe*.

Particulars of this kind, if they could be traced with certainty, would neither be unentertaining nor perhaps uſeleſs in practice: they would at leaſt be the means of giving due honour to the Authors of uſeful inventions; and ſo far would be a valuable part of legal hiſtory.

§. 17. The preſent modes of Conveyancing that principally prevail, I ſaid, were few; I can recollect but five

five at all in uſe. I mean the ſimple original Conveyances: the reſt being either derivative or collateral; or combinations of both kinds of Inſtruments in one Deed.

The Conveyances of the ſimple kind are Feoffment, Bargain and Sale, Grant, Leaſe, (to which we may add the Releaſe, becauſe it is, in fact, the principal mode of original Conveyances, tho' in its nature dependent on the Leaſe, but both Leaſe and Releaſe taken together make but one Conveyance) and laſtly, a Will or Deviſe.

By derivative Conveyances, I mean ſuch as are ſtrictly in their nature dependent on one of theſe principal original Conveyances; and either defeat, confirm, alter, or enlarge the intereſt formerly paſſed by them. Of this kind are Deeds of Confirmation, Surrender, Revo-

Revocation, Defeaſance, Aſſignment, and the like.

The complicated Conveyances of chief note, and which may occaſionally comprehend by recital all others, are a Marriage Settlement and a Will. Indeed as they reſpect the two great periods in human affairs, in which the whole of a man's effects are neceſſarily brought within his contemplation; it is no wonder they are in themſelves of a complex nature, as they muſt often exhibit a review of ſo many former acts concerning the diſpoſition of his Property; and at the ſame time look forward ſo far as in a great meaſure to influence the ſtate of it for the future.

By the former a man is as it were to endow the family, in proſpect of forming which he is induced to marry.

By

By the latter he is in proſpect of leaving this world, to provide for thoſe he would ſubſtitute here in his room as to the enjoyment of his Property: and to make an entire and complete diſpoſal of it. It is impoſſible not to recollect upon this occaſion the excellent advice of Lord Coke, which therefore I need not repeat: was it followed, it would moſt likely prevent half the diſputes that have ariſen upon this ſubject.

Neither of theſe are Common Law Conveyances; and but of late years (within a century I think) come to that ſize we now ſee them; particularly the former, which of all others beſt warrants the ſeverity of your ridicule.

For as to Wills, the Antients ſeem to have been not much leſs prolix than we are at preſent. I remember to have met with an old Greek Will of Theo-

Theophraſtus the Philoſopher, curious indeed as to its preamble, atteſtation, and many other circumſtances: but, at the ſame time, perhaps one of the ſtrongeſt inſtances now remaining to juſtify the imputation of loquacity Tully has fixed on the Greeks.

§. 18. The confuſion and uncertainty you complain of in Conveyances does not ariſe ſo much from length as from other circumſtances. Principally I think, 1. from the uſe of ill-defined words, and affectation of unuſual clauſes. The policy of the Law itſelf has in many caſes, as well as in Conveyances, guarded againſt this uncertainty by requiring in ſome caſes the inſertion of the technical word that is to denote the particular act in contemplation; and by allowing in thoſe caſes no ſubſtitution of paraphraſe or explanation. Thus in Indictments

for

for particular crimes, the words Murder, Burglary, Rape, can be ſupplied by no circumlocution whatever. And thus in particular Conveyances, the words Exchange, Bargained, Sold, and Warrant, are equally neceſſary.

But the caſes where this exactneſs is required are few; and it is no balance for the want of exactneſs in other reſpects in thoſe very caſes. The defect ariſes from a higher ſource. Lord Coke was in his time aware of it, and has pointed out the cauſe, and thereby the remedy. He tells us, Conveyances and Wills are abſurdly and intricately made, becauſe they are intruſted to "Imperites." And yet in his time, when the Law was ſo much a ſtranger to our language, Quacks in Pleading and Conveyancing could be but few in compariſon.

2. But Conveyances and Wills have now and then, it muſt be owned, ſplit upon another rock; when no ignorance of the Law could have been imputed to the makers of them, but on the contrary too much ingenuity; when they have attempted what the Law will not allow. As was the caſe of the Perpetuities, concerning which we have talked ſo much.

POLICRITES.

§. 19. And now you have once more mentioned them, let us have a word of the reaſons for which the Law entertains this abhorrence of Perpetuities. What is there of ſuch policy in the Law ſo anxiouſly reſtraining the natural wiſhes of mankind from doing by their own acts, what even the Law itſelf would in ſome meaſure do for them if it was left to the courſe and operation

operation of Law? The Law by a regular uninterrupted courſe of deſcent would tranſmit a Man's Eſtate down to his remoteſt heir at ever ſo great a diſtance: nay, a Man may grant his Eſtate to another and *his heirs for ever*. Or after all the various intermediate intereſts in an eſtate, created for thouſands of years, or after veſting an eſtate by ſo many limitations in Tail, a Man may reſerve the ſame eſtate to his own right heirs *for ever?* All this the Law confeſſedly allows: and what are views of Perpetuity, a common underſtanding would naturally aſk, if theſe are not?

EUNOMUS.

You do not want to be informed, that tho' by deſcent an eſtate may be continued lineally to the heir of any given Proprietor to the remoteſt diſ-

tance; or tho' the Proprietor may do that himſelf which (you ſay) the Law would do for him; or by parity of reaſon may upon good conſideration convey as remote an intereſt to the heir of a ſtranger; yet in none of theſe caſes, will the eſtate neceſſarily be ſo continued: nor indeed in the common courſe of things is it ever likely to reach any very remote period. When the Law continues an eſtate to a man by deſcent, the diſpoſal of it by him is as free as the poſſeſſion: and tho' the ſame deſcent would by notion of Law, and operation of the Grant, carry it down to his heirs for ever, he may the moment he is in poſſeſſion defeat the hopes of all that come after him as to this eſtate. And when I give an eſtate to a man and his heirs for ever; his diſpoſal of it to another is as free and open as mine was to him.

It

It is the attempt to confine this diſpoſal, to render an eſtate *perpetually unalienable*, or unalienable for a time, that the Law will not allow it to be tied up from alienation, that is the Perpetuity which the Law abhors. This, I ſaid, would have been the conſequence of a ſtrict adherence to the Statute de donis, with regard to individuals; and of Gifts in Mortmain to Bodies Politic. This would in a leſs degree too have been the conſequence of ſome modern ſubtleties in the moulding of Truſt Terms. All theſe attempts therefore the Law has wiſely defeated. The reaſons of the abhorrence the Law has always had to them can never be a ſecret, if you do but conſider, 1. That they are abſolutely inconſiſtent with the temper of a free Government, by lodging too much power in a few individuals.

In the feudal times they had other inconveniencies which do not now ſubſiſt, ſuch as depriving the Lords of their perquiſites.

2. But more particularly, (becauſe this inconvenience would be more ſoon and generally felt) they would be a bar to Induſtry and Commerce; the Cultivation of Land; and the Improvement of Eſtates: to which I need not ſay a freedom of charging or conveying Property is abſolutely neceſſary.

§. 20. The Common Law then has a very juſt political abhorrence of Perpetuities, or any reſtraints of Property, that are unfit for the genius of a free and commercial Country.

POLICRITES.

May it not however be thought, that the freedom of alienation itſelf is in ſome

ſome caſes exceſſive; and that political views do, in ſome inſtances, ſtand in the light of moral duties?

It may be ſaid, by the Power of making a Deviſe or Will, a perſon may leave his whole family deſtitute, and the Law cannot controul it. The Wife, it muſt be owned, is in this caſe better ſecured at all events than the Children; the proviſion of Dower at Common Law, where ſhe has not barred it by accepting a Jointure before marriage, will controul any Deviſe whatever as an antecedent claim: but a Man may leave all he has from all or any of his Children, and his Children may be without remedy.

EUNOMUS.

The juſt anſwer to this barely poſſible inconvenience is, that in conſiderable fortunes, where the inconvenience

would pinch moſt, it will be leſs likely to happen, the Children being generally provided for by Settlement, beſides the chance they have under a Will. And as to the power itſelf of diſpoſing by Wills, it is what all countries in the world have ever adopted; and as Laws are not made againſt monſters, few States have ſuppoſed that Parents would be ſo unnatural as to make uſe of this power in prejudice to their Children, and therefore have made no proviſion againſt it. Ad ea quæ frequentius accidunt, Jura adaptantur.

And this reaſoning will be an anſwer to another caſe, which may be more likely to happen, and that too perhaps without any bad intention of the Parents; and yet be equally ſevere in its conſequences. This inconvenience may reſult from the mere act

of

of the Law, even againſt the preſumed intention of the Party. A man may die ſeized of an immenſe real eſtate, and perhaps hardly any perſonal eſtate, or at leaſt not enough to diſcharge his debts: ſuppoſe that he leaves many children totally unprovided for by ſettlement, and that he dies inteſtate, the eldeſt ſon in that caſe, his heir at law, ſweeps away his whole eſtate; his other children are, as the Law ſtands, not entitled to a farthing, and have nothing to rely on but the beneficence of their brother. This caſe in all its circumſtances will rarely happen; the blame, when it does happen, muſt be laid in the firſt inſtance to the feudal courſe of deſcent, which, being once eſtabliſhed, neceſſarily occaſioned the poſſibility of this and other hardſhips, in all places where the cuſtomary power of deviſing was not preſerved: it ſubverted

verted that of the Common Law, which favoured an equal diſtribution. Many States indeed have inveſted primogeniture with a larger proportion, the feudal alone gave it an entire preference: and yet moſt writers have conſidered this preference as ſtrictly in conformity to feudal principles, and neceſſary at a time when rules of landed property were to be calculated with a view to the military genius of the times; and when war was not, as in more civilized ages, carried on merely for the ſecurity of property. When the feudal ſyſtem wore away by degrees, the power of diſpoſing by Will was re-eſtabliſhed: and that in moſt caſes is a balance to the inconveniencies ariſing from the courſe of deſcent; eſpecially if we take in the additional ſecurity moſt families have in the ſettlements made at the time they are firſt formed. This,

in

in general, will be a match for the accidental omiſſions or inequalities of a Will; much more for the uncommon chance of an inteſtacy that is to operate merely on a real eſtate.

The Law then does not deſerve to be arraigned either for its too great indulgence or reſtraint of alienation: and as to the uncertainty complained of in the forms of alienation, the cauſe of thoſe defects has in ſome meaſure been pointed out.

§. 21. But as ſome kind of balance to the unavoidable as well as artificial uncertainty of language, the Courts of Juſtice have endeavoured by conſtruction as much as poſſible to unite the intention of the parties with Rules of Law, and give them a joint operation. On this account (among other rules, which are ſo many as to exceed all recollection) 1. They will lean

more to intention in a Deviſe than in a Deed, for reaſons already given. And yet a Deviſe of Land in conſtruction has been diſtinguiſhed as much perhaps from a Will of perſonal eſtate on the one hand, as it has from a Deed on the other. The particular penning of the Acts of Hen. VIII. authoriſing Deviſes, the additional requiſites preſcribed by the Stat. Car. II. as to their execution; but above all, the conſideration of the Statutes having introduced a new Law in this reſpect, have occaſioned a Deviſe to be conſidered as an execution of a power which, like all other powers, muſt (tho' in a liberal view) be executed in purſuance of the authority from whence it is derived.

2. They will often take many different Deeds reſpecting one tranſaction all together in conſtruction, and conſider them

them as one Deed. In the ſame manner as in conſtruction of an Act of Parliament, all other Acts made in *pari materiâ* are taken as one and the ſame ſyſtem; or in the ſame manner as all the parts of any one Deed, or of any one Act of Parliament, in order to explain a particular clauſe.

3. Courts of Equity, and Courts of Law, will follow the ſame rules in conſtruction of Deviſes: and Courts of Equity, tho' they have, as I ſaid, the excluſive cognizance of Truſts, will follow the ſame rules in conſtruction of the limitations of a Truſt, as Courts of Law do in the conſtruction of legal limitations of eſtate.

And when we have this ſecurity in theſe and other fundamental rules of conſtruction, there is but little reaſon to exclaim againſt variety of ſeemingly diſcordant conſtructions on the penning of

of particular Conveyances, each affecting to diſtinguiſh itſelf by ſome peculiarity of cant or expreſſion, which muſt ever be at the riſque of a different (and moſt often a fatal) conſtruction.

§. 22. But theſe conſiderations at beſt are a digreſſion from our ſubject of Conveyancing. When the Draught is perfect, the Conveyancer has finiſhed the arduous part of his buſineſs. The Agent muſt ſee it properly engroſſed and executed: when executed, the parties themſelves muſt take care to preſerve it.

And as far as concerns the Artiſt, if we were to recapitulate in a few words, in the abſtract nothing more ſeems neceſſary in this art than to know what "degree of property the "party is clearly poſſeſſed of; what "intereſt it is his intention to convey; "and if the intention is legal, how "to

" to effectuate it by the beſt legal " Form of Conveyance." Taking care here, as was ſaid, in Pleading, in the firſt place to chuſe a form ſuited to the ſubject; and when choſen, to obſerve the neceſſary preciſion which that form requires.

POLICRITES.

§. 23. It would be rather a paradox to the rules of politeneſs, or of honeſty, to tell you, the reaſon of my not having kept my word with you is becauſe you have kept yours ſo well with me, in giving me more ſatisfaction than I expected on the ſubject. I promiſe you I ſhould not have ſpared any objections that had occurred to me on the foot of interruption; but you have in this part of your diſcourſe not given me much opportunity. Another topic yet remains; as to which you will

will hardly be ſo fortunate, I mean what is commonly called "Practice of "Courts:" by which I underſtand one mighty maze without any plan: where you may wander on without any guide to direct your ſteps, or any hopes of keeping the right path, if by chance you are once got into it.

EUNOMUS.

I will own to you, the knowledge of Practice can be acquired only by Practice; tho' as its rules depend on principles, it is as much a ſcience as any other part of the Law is. It is impoſſible at preſent even to recollect thoſe rules, and often difficult to inveſtigate them. The very few books of any credit that have been written on this ſubject are written on a looſe and unconnected plan; and after all ſpeak only to the learned. This branch of

Law is more than any other deſtitute of any elementary treatiſe. Whoever affects acquaintance with it, is left both to teach and to perfect himſelf in it by experience; and muſt not expect from any thing hitherto communicated on this ſubject, to form an idea of it without a conſiderable attendance, and without making his own concluſions from a vaſt number of particulars. For the very few books about it are a mere common-place, diſtributed under ſome general titles, of uſe perhaps to Practiſers themſelves, but have no tendency to convey a knowledge of Practice. As I was led by theſe reflections to think upon this ſubject; and am ſatisfied the idea I had formed is a *new one*, ſo I am in ſome hopes it is not altogether inaccurate; and that it will place the thing

in rather a clearer and leſs diſagreeable light than it has been hitherto ſeen in.

§. 24. In unfolding my idea of practice, I ſhall ſpeak to you as I would to the world, was I to write upon the ſubject: in which ſituation I would ſuppoſe my Readers perſons firſt ſetting out in the profeſſion, who either from Lectures in their Univerſity, or their own private Studies, had a tolerable notion of the general principles of our Law, tho' they had not as yet, or had but barely, ſet a foot in Weſtminſter-Hall; and conſequently had as little idea of the Practice of a Court as is poſſible: it being pretty clear, I ſuppoſe, that no-body is born with knowledge of this kind; and perhaps as clear that no-body would deſire ever to acquire it without the proſpect of a lucrative application. This being premiſed, a great part of what

what I have to ſay ſhall ariſe from the following caſe.

" A Perſon (let us ſuppoſe) who " has a Cauſe of Action, either in a " Right detained, or an Injury done, " is determined to bring his Action; " and by his Attorney takes out Pro- " ceſs againſt the Party complained " of; in conſequence of which the " Party complained of (whom we " call the Defendant) either puts in " common or ſpecial Bail, as the " caſe requires. The Defendant " being thus ſecured, the Plaintiff " declares, in proper form, the na- " ture of his caſe. The Defendant " anſwers this Declaration; and the " Charge and Defence, by due courſe " of Pleading, are brought to one or " more plain ſimple Facts. Theſe " Facts ariſing out of the Pleadings, " and thence called Iſſues, come next

" to be tried by a Jury. The Jury " having heard the Evidence upon " the Iſſue before them, find (we will " ſuppoſe) a verdict for the Plaintiff; " on that verdict Judgment is after- " wards entered. The Plaintiff's Coſts " of Suit are then taxed by the Officer " of the Court; and the Judgment " is put in Execution by levying " on the Defendant's Effects, the " Damages given by the Jury and the " Coſts allowed by the Court; which " being done, there is an end of the " Suit, and both Parties are once " more out of Court."

POLICRITES.

Short and clear indeed! But you forget that this view of a cauſe, without any interruption from the firſt Proceſs to the Execution, compared with its real progreſs, is like the idea a traveller

traveller forms of a country beheld at a diſtance: mountains and villages appear much nearer than they really are; the ſeveral intermediate valleys and various inequalities of ſurface being overlooked in ſo extenſive a proſpect. And whoever thinks to ſee an end of a cauſe, in every caſe, by going regularly on without any delay from its commencement to its concluſion, propoſes to travel as a bird does through the air. Deſign and accident may both ſtand in his way: and here, as in Mechanics, the whole motion which began in one direction may be deflected altogether into another.

EUNOMUS.

§. 25. The Practice of a Court in Civil Suits, I own to you ariſes almoſt entirely "from the interruption" in the regular ſtages and courſe of a cauſe.

Thoſe regular ſtages (as to the time and manner of carrying them on) are themſelves the legitimate offspring of the eſtabliſhed Practice of the Court, where the cauſe is brought: when they are purſued, the courſe of the proceeding runs on ſmooth and ſilent, tranſacted by the Attornies in the cauſe and the Officers of the Court, without ever being heard of in open Court. The irregularities that puſh a cauſe out of its regular courſe muſt be redreſſed by the interpoſition of the Court: and it is this kind of buſineſs that furniſhes and makes up a great part of the viſible Practice of the Court in Term time.

§. 26. This idea of Practice will ſcarce be intelligible without going into particulars. I will do this with pleaſure, becauſe it will not only explain my notion more fully, but will give

give me an opportunity of vindicating the Law from a very popular objection, ariſing (if any where) from this quarter, I mean "its delay."

I need ſcarce premiſe, that the Application to a Court by Council is called a Motion; and that the order made by a Court on any Motion, when drawn into form by the Officer, is called a Rule.

In the caſe put, I ſaid, the Attorney firſt takes out Proceſs againſt the Defendant, in order to make him appear and put in bail. 1. The Proceſs taken out may be irregular, and then it will produce *Motions to ſet it aſide*. As for inſtance; where the Defendant is a privileged perſon. 2. It may not only be irregular, but highly oppreſſive; and then it grounds a *Motion for an Attachment* againſt the Parties executing the Proceſs, as for a

conſtructive contempt of the Court. This is a general Motion, and may (as the oppreſſion itſelf may) ariſe in any ſtage of the cauſe. The Suit itſelf, as well as the Proceſs, may be irregular; and then it will occaſion *a Motion to ſtay Proceedings in a Cauſe*, as either where the Parties have agreed to compromiſe the matters in difference, and a releaſe is not executed; for the releaſe when executed may be pleaded in bar of the action. The firſt Proceſs may be regular, and the Bail may not; and then we hear of various Motions — either, 1. *To diſcharge the Defendant on Common Bail*, where it appears from the affidavit that he is not liable to give ſpecial bail; or where the affidavit to hold to bail is defective. 2. *To ſet aſide a Judge's Order* made at his chambers relating to the bail. This kind of Motion may

may be made on other grounds; if the bail is regular in the manner of putting it in, but ſuſpicious as to the circumſtance of the bail; the Plaintiff gives notice, and the Defendant *moves to juſtify bail* in open Court.

§. 27. Having done with the Bail, we will come to the Declaration; and this will furniſh ſeveral Motions as to the delivery of it—the frame and ſtructure of it—or the neglect of it by the Defendant.

Perhaps it cannot be delivered in the common form, the party abſconding to avoid it: and then the Plaintiff moves *that ſome other ſervice of* the Declaration *may be ſufficient*. The Declaration being delivered, the Defendant may apprehend it to be immoderately prolix and impertinent; in which caſe he will *move to ſtrike out ſome Counts in the Declaration:* the Court

Court uſually, upon this, order it to be referred to the Maſter of the Plea Office, and the Maſter's Report is the ground of the Rule afterwards made. *A Motion for the Maſter's Report*, is another Motion that may ariſe in various parts of a cauſe, as I ſhall repeat.

In an action, that is in its nature tranſitory, if the Declaration lays the Cauſe of Action in one county, and it did in reality ariſe in another, the Defendant may avail himſelf of that circumſtance; and upon Affidavit apply to the Court for the Plaintiff *to change the Venue*, that is, the place where the cauſe of action is declared to have happened, from the firſt county to the latter. The Venue may likewiſe be changed from any county in England, wherever the Cauſe of Action aroſe, to that of Middleſex, where the Court ſits, if the Defendant is privileged as attendant

attendant on that Court: or where the Jury, and not the Venue, is to be changed, as where the material evidence ariſes in the place laid; but no Jury, common or ſpecial, can be had diſintereſted (as where it is a County-Cauſe about a Bridge, or the like) it is uſual to *move for a trial in the adjoining county upon entering a Suggeſtion on the Roll.*

A Suggeſtion on the Roll is ſometimes entered for other purpoſes; as where the Sheriff, who regularly returns the Proceſs, is partial: and this too even in the return of the Freeholder's Book for a Special Jury to be ſtruck by the Officer of the Court; in that caſe the Coroner muſt return the liſt; and even where this precaution is neglected, a challenge may be taken to the array of a Special Jury at the trial.

If

If a Declaration is ſubſtantially defective, the Defendant, inſtead of anſwering, demurs to it. The exception he takes, is thereupon ſolemnly argued in Court; if allowed, the Defendant has final Judgment; if diſallowed, there is Judgment againſt him to anſwer farther. If, on the other hand, the Declaration is delivered, and is unexceptionable, and the Defendant neglects to anſwer it in due time, the Plaintiff has his Judgment by Default; but if the Plaintiff is over haſty in ſigning this Judgment, the Court will interpoſe *on a Motion to ſet aſide the Judgment*; in conſequence of which, the Defendant will be at liberty to plead. The Motion to ſet aſide a Judgment obtains in other inſtances; and the Motion for Judgment, as in caſe of a nonſuit, ariſes

on

on another ground: both which I will ſhew.

§. 28. When the Defendant comes to plead to the Declaration, inſtead of making in due time a plain denial of the charge, called the *general iſſue*, he may find it neceſſary to vary the common courſe, either by enlarging the time or the manner of pleading; in which caſes he will *move for time to plead:* which being a matter of indulgence, the Court upon the equity of the caſe may refuſe or grant: and grant without or upon terms. At Common Law, you know, a Defendant could only plead one ſingle matter; which rigour often abridged the juſtice of his defence, and was doubtleſs one cauſe of perplexed inartificial pleading, the party endeavouring to croud as much reaſon as he could into his plea, however intricate, repugnant and

and contradictory he made it by ſo doing. The Legiſlature thought it neceſſary to remedy this great defect, and have enabled the Defendant, as it were, to open as many trenches againſt the enemy as the nature of his ground will permit. By theſe means the fort indeed is oftentimes rendered impregnable; but ſometimes the ſiege is only protracted. However, to drop our allegory and go on with the cauſe; if the Defendant thinks more than one plea neceſſary, he *moves the Court for leave to plead ſeveral matters*, which he mentions. Sometimes this expedient is an after-thought, and then as it tends to delay the Plaintiff by putting him out of the beaten track, the Defendant *moves to withdraw the general Iſſue* and be at liberty to *plead ſpecially*; ſometimes he moves the contrary.

§. 29.

§. 29. The Plea, Replication, Rejoinder, &c. if they are ſo lucky as to eſcape Demurrers, are at length quietly ſettled on Record, and come to that happy period called an Iſſue, which remains to be ſent to a Jury: in order to which all the Record down to the Iſſue which it includes, is tranſcribed from what is called the Plea Roll, and which is only part of a large bundle comprehending the caſes of a hundred other perſons, and never ſtirs out of cuſtody of the Court. That tranſcript is called the *Niſi Prius* Roll: as the Niſi Prius Roll, after it is returned from the trial, aſſumes the Name of the *Poſtea*; terms you will allow extremely ſignificant when their origin is compared with their application, however barbarous when they ſtand by themſelves: as awkward perhaps in the eye of prejudice, as a foreigner

foreigner may appear to the vulgar of our own country; and for no other reaſon but becauſe his dreſs and manner are different from their own.

§. 30. Between the Iſſue and the Trial ſeveral Motions may happen which may either put off the trial or not. Of the latter kind, and at this ſtage, is a Motion by the Defendant for leave *to pay money into Court*; which is an admiſſion of ſo much being due, and nonſuits the Plaintiff if he does not prove at the trial that more is due than what the Defendant has ſo paid into Court. The ſame kind of application has been extended to goods of various kind in diſpute; but as to theſe the Court has been rather ſhy in granting the Rule, and has ſaid more than once, "that they "do not keep a warehouſe;" and indeed Weſtminſter-Hall would hardly be

be big enough for the purpoſe, if this kind of application was much indulged: beſides, no Recovery in a Perſonal Action, except in that of detinue, is ſpecific as to the thing itſelf, tho' it is as to the value; and conſequently as the thing, when ſo returned, may be in a worſe condition than when it was taken, the Plaintiff would be worſe off by having it brought into Court, than if he had damages eſtimated according to the value of it at the time it was taken.

Many circumſtances may make it neceſſary to poſtpone a trial, or vary the common forms of examination. The neceſſary witneſſes in the cauſe may reſide altogether abroad, or being there for a time, may not be likely to return at the regular time of the trial: in the firſt caſe the Court is moved for *a commiſſion to examine witneſs on*

interrogatories; which interrogatories are ſettled here, ſent over, and with their anſwers properly atteſted are ſent back and read in evidence at the trial: in the latter caſe, the trial is delayed, on motion to *put it off for the abſence of a material witneſs*. But ſuppoſe by this delay the other ſide are likely to loſe evidence that is ready at the time, either in caſe a material witneſs is ſo old and infirm that he is not likely to ſurvive the arrival of the evidence expected by the other party? or in caſe his neceſſary buſineſs, as a trading voyage or employment abroad, obliges him to leave England before the trial can come on?

POLICRITES.

That part of the delay you are now conſidering reminds me of an odd anecdote I have heard of this nature: a

cauſe of conſequence was put off for ſome years during Queen Anne's Wars, on a motion from time to time to put it off, on the abſence of the Duke of Marlborough, who was a material witneſs, and obliged by his poſt to be often backwards and forwards.

EUNOMUS.

In a caſe however far ſhort of that, you will agree that the indulgence to one ſide in putting off the trial would produce an injury to the other; unleſs ſome proviſion was made on his part by way of equivalent: and therefore whenever that is the caſe, on the other ſide a *motion is made to examine ſuch witneſs de bene eſſe*; the conſequence of which is to admit the depoſitions ſo taken as evidence, if the perſon can not afterwards be examined in chief at the trial. What if a witneſs is under

none of theſe incapacities, but being duly ſummoned neglects to attend? his negligence ought not to prejudice the oppoſite ſide, tho' it does an injury to the ſide which ſummons him. The trial in that caſe then ought not to be put off as a mere matter of indifference. The other party has brought perhaps a waggon full of witneſſes, has made out his briefs, and his briefs are delivered to Council: in that ſituation the other ſide muſt either go on with the trial and place his miſcarriage to the abſent witneſſes account; or he muſt withdraw his Record, and pay the other ſide their expences for attending the trial. Hard he ſhould do either, and the witneſs himſelf, the cauſe of the miſchief, remain with impunity. The Law therefore gives two remedies againſt the witneſs in ſuch a caſe— 1. Either to bring an Action upon the

Statute to recover the penalty expreſſed in his ſummons; or 2. The Law in vindication of the contempt itſelf has ſuffered by his neglect, will puniſh him criminally, on *a Motion for an Attachment.*

But we have hitherto been conſidering only parole or living evidence, as having an influence on the delay of a trial. The ſame muſt in many caſes follow from written teſtimony. Thus for inſtance, among other particulars, we often hear of *Motions for leave to inſpect and take Copies of Corporation Books*; or of *Motions for an order to produce them at the Trial.*

§. 31. And not only the Witneſſes in a Cauſe, but the Jury occaſion particular applications to the Court: ſo does the nature of the Cauſe in queſtion; and ſo does the courſe of judicature itſelf. The nature of the Cauſe will ſome-

times require the Jury to ſee the very ſpot where the matter in diſpute ariſes; in which caſe, after Iſſue joined, the Court *is moved for a view*. The Cauſe is at other times either of that nature that it may exceed the apprehenſion, or be likely to inflame the paſſions of a common Jury; in either caſe, *a Special Jury will be moved for*, compoſed of Gentlemen of ſuperior underſtanding, and leſs liable to influence, than country people in general can be ſuppoſed to be. Sometimes the Cauſe is apparently likely to be very long, intricate, and important: important, I mean, both in its value and conſequences; circumſtances which make it neither eligible to bring it on before a ſingle Judge, or within the confined limits of an aſſize commiſſion. Beſides, it is very well known (ſo much does great modeſty inſeparably accompany

pany uncommon merit) that Judges of the greateſt abilities have uſually declined giving any deciſive opinion on important points ariſing at the trial in the country: in conſequence of which, what with all the train of expence and delay attending the argument of a Caſe or Special Verdict; it is ſometimes much better at once, all things conſidered, to bring the Jury and Witneſſes up to town, and try your Cauſe before the whole Court. From theſe conſiderations ariſes a *Motion for a Trial at Bar*; which being allowed, very often the points are determined, as they ariſe, by all the Judges of the Court, and ſatisfaction given to both parties: in which caſe the extraordinary expence of the trial is more than balanced perhaps by the conſideration of its being moſt probably deciſive.

§. 32. After having thus gone a little out of the way to put a caſe leſs common, let us once more return to the common caſe, and imagine the Cauſe brought to the Aſſizes, the Jury ſworn, and the Witneſſes (if you will) examined. The trial goes on, or it does not—if it goes on, either a verdict is given, or there is not—if a verdict is given, it is either given for the Plaintiff or for the Defendant. The Jury may be ſworn, and the Witneſſes may be in part examined, and yet the trial may ſtop; becauſe the Parties may then, or at any time, compromiſe the matter in difference, or agree to refer it to arbitrators: in either caſe a rule is made at the aſſizes (called an order of Niſi Prius) and motion is afterwards made *to make the order of Niſi Prius a Rule of Court*. This is always done upon conſent of both

both ſides, and is the beſt ſecurity of performing an agreement or an award; becauſe it engages the beſt ſecond in the world to fight with your antagoniſt, by making the injury done to you a contempt of the Court.

Well, but ſuppoſe the parties are as averſe to a reference "as the widow "Blackacre in the play[a]," the Cauſe then, it is plain, muſt go on: it may go on, and yet not get to a verdict; becauſe if the Plaintiff does not prove his Caſe, the Defendant calls no evidence; and inſtead of a verdict on either ſide there is a nonſuit. Whereever a verdict is given, the Plaintiff at leaſt muſt give evidence to maintain his Declaration: where evidence is produced on both ſides, the verdict is given for the Plaintiff or Defendant,

[a] Wycherley's Plain Dealer.

according

according to the ſuperior weight of evidence.

§. 33. Here cloſes the trial; and from this period it is that the Record aſſumes the name of the *Poſtea*; and if the trial is deciſive, by neither the Law nor the Fact being afterwards controverted, the Poſtea is delivered by the proper Officer to the Attorney of the victorious Party to ſign his Judgment: but in many caſes after a verdict given, there is room to queſtion its validity; in which caſs the Poſtea remains in cuſtody of the Court. The verdict may be exceptionable either from miſdirection of a Judge in point of Law, or the miſbehaviour of the Jury —in which caſe a motion may be made *to ſet it aſide*, (as it may on other grounds)—or from a manifeſt imputation on their Judgment in its being clearly contrary to evidence; or in the damages

damages given greatly exceeding the injury ſuſtained; in both which reſpects a *new trial may be moved for:* or if the verdict itſelf ſtands unimpeached, yet ſome original defect may appear on the face of the Record which ſhews no verdict ought to have been given, or though given no Judgment can be had on it: and when this happens, the motion is in *Arreſt of Judgment.* Suppoſing the Verdict and Record to ſtand clear of all objections, the Judgment follows of courſe; and after Judgment, Execution. The purpoſe of which Execution is to levy the damages aſſeſſed by the Jury, and the coſts allowed by the Court. The Execution however may for a ſhort time be interrupted, in caſe any objection ariſes to the taxation of coſts; and then a motion may be made for the Maſter *to review his taxation.* This

and

and every act of the Maſter being liable to be reviewed on appeal to the Court; tho' in judging of ordinary ſtages of Practice, he is inveſted with original and competent juriſdiction: this Officer, both in his ſituation and employment, bearing no very remote analogy to the Judex Pedaneus of the Roman Law. The Execution may be ſuſpended on other grounds; the original party may die, in which caſe (where the action is not perſonal) a ſcire facias muſt be had againſt his executor: or ſometimes, where the original party is ſtill living, inſtead of an Execution had on the Judgment, an Action of Debt may be brought on it. That action, (unfavourable in the eye of the Law, becauſe it is commonly the offspring of negligence and oppreſſion,) may for inſtance be brought where an Execution againſt the

the goods was preferred to that againſt the perſon, and it comes out from the return of the Sheriff that no goods are to be found. If the Sheriff in this reſpect returns a falſity in fact, or in point of Law by an illegal preference of one demand to another, he is liable to an action for ſuch falſe return. But if he or his Officers miſbehave in this kind of execution, or in any other ſervice of a writ, they are liable to an Attachment; which, as I hinted, is a remedy the Court have always at hand to redreſs the oppreſſion of their Officers in any ſtage of the proceeding: and it would be well if it was conſidered by them like the drawn ſword of Damocles ever hanging from a ſlender hair, with the point juſt over their heads, and ready to fall upon them.

§. 34.

§. 34. When Execution is over, the Cauſe is over: and the Parties cannot well have a longer heat than in the courſe I have deſcribed. But a Cauſe may on many occaſions come much ſooner to an end; and in a direction very different from what has been mentioned.—It may come ſooner to a trial—or it may come to execution without a trial. I will begin with the latter. In the caſe I put at ſetting out, and in the general expoſition of the caſe, it has been ſuppoſed that the Defendant pleaded to the Declaration: but it was intimated, that if he neglected to plead, Judgment would be had againſt him by default. It was not ſo proper at that time to purſue the conſequences of that meaſure: but now I muſt obſerve, that in conſequence of the default of a plea, the truth of the fact is confeſſed, and cannot

cannot be afterwards litigated as it is on a trial: but this Judgment, tho' it operates ſo as to preclude the Defendant from controverting the fact, which is the cauſe of action, does not go to a confeſſion of the damages laid in the Declaration; for a perſon may lay any damages in his Declaration, and is not at liberty to recover more than he does lay, even tho' he proves it on evidence; becauſe, perhaps, no parole proof ſhall prevail againſt his own admiſſion on record. But with this liberty of laying damages to any amount, it would be manifeſtly unjuſt ſhould he recover any more damages than he actually proves: that he ſhould be permitted to form an imaginary ſcale of his own, and others be obliged to conform to its meaſure. And therefore in every caſe the actual proof of damages muſt ever precede the recovery

covery of them. In the caſe of a Judgment by default, inſtead of the common proceſs and the regular formation of an iſſue, as in the common courſe, a writ of enquiry goes to the Sheriff, who ſummons a Jury for the purpoſe of aſcertaining the damages: 'till this is done, the Judgment is called Interlocutory, in oppoſition to a final complete Judgment. In this courſe of proceeding other motions may ariſe—*to ſet aſide the Judgment and Writ of Enquiry* iſſued thereon, as irregular—*to execute a Writ of Enquiry before a Judge* inſtead of the Sheriff, where it is a matter of importance—and ſometimes for a *new Writ of Enquiry for exceſſive damages*, in the ſame manner as for a new trial on thoſe grounds. When the Writ of Enquiry has been duly executed, then the cauſe comes out of this by-path, and goes on

en in the old road to the regular Judgment and Execution.

§. 35. There are two caſes, however, where the admiſſion of the Defendant ſilences all future enquiry either as to the truth of the fact, or the quantity of the damages: and conſequently ſuperſedes both a common trial and writs of enquiry—that of a direct "confeſſion of the action"—and a warrant of Attorney to confeſs a Judgment: this latter occaſions a motion very often; for where it is above a year ſtanding, motion muſt be made *for leave to file the Warrant of Attorney* on affidavit of the Defendant being ſtill alive and the debt unpaid.

When I ſaid, juſt now, a matter may come ſooner to a trial, I alluded to what is called an *iſſue directed* by the Court; which obtains in a Court of Law principally where a queſtion

of civil right is involved in a criminal proſecution for a miſdemeanor; in which caſe, it is the uſual lenity of the Court to ſuſpend the latter till the former has been tried: or where a Court of Equity directs facts to be enquired of at Law, and does not reſt the caſe on depoſitions. And this manner of trying the fact, by directing an iſſue, has great advantages over a regular form of action: 1. In being better adapted to the real merits of the caſe. 2. In avoiding the delay and intricacy of Pleading. And it is in effect pretty near the method that I ſaid had been propoſed as a ſubſtitute for ſpecial pleading in all caſes: for under the form of a wager, the real point between the parties is always brought into queſtion.

§. 36. Thus have we, in a regular analyſis of a civil ſuit, ſeen how a very great

great part of the Practice of the Court in cauſes does ariſe. The general motions have been progreſſively pointed out in the natural order, tho' in the courſe of practice they muſt be made promiſcuouſly: and tho' in this view they appear but few and ſimple, are yet capable of being infinitely diverſified as to their objects.

After having ſo minutely traced the ſmalleſt fibres of this branch of practice, let us endeavour to conſider practice itſelf as one whole; and ſee what other diviſions it is capable of, and which may aſſiſt in giving a general idea of it.

It is evident from the leaſt recollection, that what has been ſaid relates merely to the practice of the Court in civil ſuits; and in general concerns the trial of a cauſe; and therefore the former ſubject may be for a moment

reſumed, in order (by way of giving a fuller general idea of practice) to eſtabliſh a diſtinction between ſuch motions as are in their nature *previous* to the trial itſelf, or *ſubſequent* to it. Of the former ſort are motions — to ſtay proceedings in a cauſe — all motions relating to bail — all relating to declarations — to the time and manner of pleading — for changing venues — ſpecial juries, and many others we have juſt conſidered. Of the latter ſort neceſſarily are motions to ſet aſide verdicts — for new trials — in arreſt of judgment — motions concerning writs of enquiry, and others that are eaſily claſſed according to this diviſion from what has now paſſed. There are ſome Motions too, you will remember, that in the abſtract are of an ambiguous nature, and may ariſe in any part of a cauſe, either before or after

after a trial. Such, doubtleſs, you will allow are Motions for an Attachment — and for a Maſter's Report — and there may poſſibly be others, tho' I do not at this time recollect them.

§. 37. Every Motion hitherto has been ſuppoſed to have ſome relation to the trial of a cauſe; there are ſome few intirely independent of it — ſuch may a *Motion for a Prohibition* be in many caſes; ſuch are many applications to the Court for ſummary relief on Acts of Parliament — as relating to articles of Clerks, to Attornies — Inſolvent Debtors, and others of that ſtamp.

POLICRITES.

In this analyſis you ſeem to have paſſed over the capital diſtinction of a court of Law conſidered as having civil or criminal juriſdiction: having ſo

fully diſcuſſed the former, I hope you do not mean to forget the other.

EUNOMUS.

§. 38. The Crown buſineſs (which was originally the only branch of the juriſdiction of the Court of King's Bench, and of which it ſtill retains excluſive juriſdiction) muſt be treated of in a different method, from that I fell into in deſcribing the courſe of Practice in cauſes between man and man. There I deduced the great outlines of Practice from a minute analyſis of a civil action: the Practice of Courts of Equity may be deduced in the ſame manner, by attending to the ſeveral ſtages from the filing of the Bill to the Execution of the Decree. The conformity is ſo obvious that it is unneceſſary further to unfold this idea by recurring to particulars.

The Practice on the Crown-ſide will not admit of the application of this idea: much the greateſt part of it is independent of any ſolemn trial; and the trials themſelves are too ſimple to endure much interruption, or branch out into many points of Practice. I know not how to explain it better than by dividing the Crown Practice into ſuch matters as originally commence in this Court; and ſuch as are removed into it from other inferior juriſdictions. Of both which kinds taken together (for we need not diſtinguiſh them minutely at preſent) are, Motions for an Habeas Corpus — for Mandamus's — to exhibit Articles of the Peace — Motions relating to the diſcharge of Recognizances, to remove Indictments, Orders of Seſſions, Convictions made by Juſtices from their common ordinary courſe of proceed-

ing by Writ of Certiorari into this Court, on ſome foundation of complaint againſt them. The viſible Practice that occaſions this removal, and that ariſes from it, may be reſolved into theſe few Motions, very ſimple in their kind, tho' infinitely diverſified as to their objects.

1. The general *Motion to remove* the Indictment, the Order or Conviction *by Certiorari.* 2. *Motion to quaſh* the Indictment, Order, or Conviction when it is removed. And in the caſe of an Indictment removed, either on a Demurrer it is ſet down to be argued; or *Motion is made to quaſh* it before trial, or *Motion in arreſt of Judgment*, or *Motion for Judgment*, after the trial. The *Motion for a ſpecial Jury*, as well as ſome other Motions already mentioned, may accidentally be made in the

the caſe of an Indictment, as it is in a civil ſuit.

2. But the moſt extenſive juriſdiction is involved in matters of original cognizance, whether it regards Indictments or Informations — or ſuch matters as are entirely independent of either, or any ſolemn trial; ſuch as begin and end on Motions: but of all this I need not be very particular.

There is little or no difference between an Indictment commenced in this Court, or removed from another county, as to the Motions concerning them. As to Informations, tho' altogether the creature of this Court, they admit but of three Motions — *the application to the Court to grant it*— when granted and tried, a caſual *Motion in arreſt of Judgment* on grounds ariſing from the Record itſelf — or where the charge in the Information and

and the Verdict are both inconteſtable, the *Motion for Judgment*.

§. 39. You muſt have obſerved, there is a pleaſing ſimplicity in Crown Proceedings, that at the ſame time it favours the Liberty of the Subject, raiſes the dignity of the Law itſelf: that at the ſame time it has ſtood the teſt of ages, has ſtood unimitated or unequalled.

POLICRITES.

Whatever may be ſaid of them, by way of commendation in this reſpect, they have not however eſcaped cenſure in another. In particular, the form of Proſecution, by way of *Information*, has been much inveighed againſt when compared with *that of Indictment*.

EUNOMUS.

Whether this has been done on juſt grounds may be worth while for us to ſtop and conſider; and the rather, becauſe the path is not ſo much out of our way as new in itſelf.

Let us ſee wherein they agree, and wherein they differ. They agree in this, that each is *only an accuſation* of a crime; and where each has the ſame crime for its ſubject (as it may have in many miſdemeanors) the puniſhment may be exactly the ſame: becauſe ſuppoſing the puniſhment in ſuch caſes diſcretionary in the Court, the Court does not neceſſarily attend to the mode of proſecution, in fixing the nature or quantity of the puniſhment.

But they differ, it may be ſaid, in this, that the accuſation in one ſhape is more rigorous than in the other; and

and that tho' the puniſhment, as to (the ſtrict idea of it) the ſentence of the Court, be the ſame, yet the conſequences of one mode of proſecution being more ſevere than the other, one mode may be ſaid to be much more penal than the other.

When I do moſt heartily give the preference to that of Indictment, as the moſt ancient, approved, conſtitutional form of proceeding, I muſt not be ſo partial as not to own an Information has its great uſe in many caſes where an indictment can not be had; and that tho' an Indictment upon the whole is preferable, yet an Information has many peculiar advantages to the Defendant, that are overlooked by prejudice and inattention.

The moſt glaring circumſtance that diſtinguiſhes the method by Indictment, and ſeems to give it ſo great a preference

preference to an Information, is the manner in which the accuſation by Bill is made. In every Bill found by a Grand Jury, twelve perſons at leaſt muſt concur in finding the facts that are the grounds of the accuſation. In a proſecution commenced by Information, only four can give an opinion as to the weight of the charge laid before them; a concurrence of three is ſufficient to direct the proſecution; or even two, who may be the only perſons preſent in Court. Setting aſide therefore any ſuppoſition of ſuperior abilities and greater experience reſulting from the particular ſtation of the perſons who decide on the latter; it may be ſaid, in a Judgment of facts (of which every man is preſumed a competent judge) a Defendant has naturally a greater ſecurity for a right Judgment from a greater num-

ber. He has this advantage too in a proceeding before a Grand Jury, that if they judge in his favour, by throwing out the bill, he is entitled to his action againſt the Proſecutor for a malicious proſecution, in the ſame manner as if the Bill had been found, and he was afterwards acquitted on his trial: but tho' an Information is refuſed on application, or tho' the Defendant is acquitted on his trial, I do not know, that in either caſe, he has any remedy for a vexatious and oppreſſive Proſecution; and yet the expence, which is the ground of the action in the firſt caſe, is much greater in every ſhape in the latter.

Theſe circumſtances tending to guard any one from an undue Proſecution, or giving him the means of avenging an attempt towards it, will naturally be conſidered as inclining the

the balance much in favour of Indictments. But then before the other Proſecution can be directed, a perſon has opportunities of defending himſelf, which he has not in the former. He can be heard on oath in anſwer to the charge made; and the Court judges on weighing the Affidavits of one ſide againſt thoſe of the other: but a Bill preferred before a Grand Jury is a proceeding merely ex parte; it is an accuſation which is to be anſwered hereafter: but this tho', as it precludes nothing at a future trial, it is no more than an accuſation; yet as it undergoes ſo cloſe an examination in the outſet, may be juſtly conſidered as a kind of trial in itſelf. As ſuch an enquiry therefore, when it terminates in conviction, induces a ſtronger preſumption of guilt; it does

with

with more propriety aggravate the expence, if not the puniſhment.

But this previous examination is full as material in its conſequences to the Defendant at the time of his trial, as it was at the time of making the charge. He can confront the witneſſes with their own affidavits; and the credit of their evidence at the trial will depend on the conſiſtence of it with their former account. And as this circumſtance more eaſily leads to the detection of Perjury, it is in ſome meaſure an equivalent to the advantage in the other caſe from an action for a malicious Proſecution.

Let it be remembered too, that ſince the Statute of King William, this mode of Proſecution is on a much better footing than it was formerly, in which indeed it was open to very juſt

juſt complaints. Now it muſt be either applied for in open Court, or filed by the Attorney-General, and not the Coroner, or Maſter of the Crown-Office, as it was before; tho' it has been ſuppoſed that the Bill was intended to have been much more comprehenſive in its reſtrictions than it was, as it afterwards paſſed.

It is ſcarce incumbent on me to add, that moſt of the Motions that have been all along mentioned in conſidering the courſe of Practice, are attended with Affidavits, or ſworn depoſitions in writing. Courts of Juſtice ſeldom give any credit to parties but upon oath: indeed, how could they, when each ſide would demand the like credit to their aſſertions, tho' what they aſſerted was in contradiction to each other? It is much to be doubted, whether the oath itſelf

upon all occaſions deſerves credit: but ſuppoſing it does in general, thus much may be obſerved of Affidavits, that the reaſon of the Motion being made, the perſpicuity of the facts to be diſcloſed in it, and the opinion of the Court upon thoſe facts, all depend ultimately upon them. An oath in all judicial tranſactions is the dernier reſort in queſt of truth: and ſo much is an oath regarded by the Court upon theſe occaſions, that when Affidavits are full and poſitive, the Court has leſs room to go into circumſtances. But when they are evaſive and contradictory; and while falſhood, that muſt lay ſomewhere, is concealed, becauſe the credit of the party falſifying is, as yet, unimpeached; it would be impoſſible to come at the truth, without ſifting the Affidavits themſelves; whence, by comparing the circumſtances,

ſtances, it may be found (if poſſible) on which ſide the juſtice of the cauſe is placed: and where, for want of it, a miſerable ſupport is borrowed from enormous Perjury. It muſt be own'd, that iniquity, ripened by ſome experience, is often capable of framing ſuch Affidavits; that, like Milton's Hell, they ſhall diſcover

"No light, but rather darkneſs viſible."

Sometimes, one would think, the ſucceſs of the cauſe depended merely upon ſwearing laſt.

I can not but obſerve, there ſeems to be no crime that deſerves its puniſhment more than that of Perjury; for no crime can have conſequences more univerſally deſtructive. Does not every trial, and all determinations in Courts of Juſtice, whether life or property is at ſtake, depend upon evidence on oath? Among the arguments on every ſide of us, there is none that more

forcibly proves the uſe of Religion in ſociety, than the general uſe made in ſociety of this act of Religion, called an Oath. There is none, we may add, ſhews a greater contempt of Religion, than a breach of Oaths; and, in proportion, as Perjury gathers ſtrength, and comes off with impunity, nothing bids fairer for the utter ſubverſion of Law and Juſtice, and, in the ruin of them, for the diſſolution of ſociety.

But this is not the only, tho' the principal, complaint againſt ſome Affidavits. The matter of them is not only often falſe, but as often frivolous. Inſtead of containing poſitive aſſertions, as from their nature they ought to have, they are ſtuffed with impertinent ſtories and concluſions from ſuppoſed facts, inſtead of the facts themſelves, that ought to be poſitively alledged. Often you will obſerve,

obſerve, the very language of Affidavits renders them ſuſpicious, by being too artificial; as when countrymen expreſs their knowledge of the facts they atteſt,—

Velut innati triviis ac pœne Forenſes;

or when two Affidavits are too ſimilar to have been made by different perſons.

After theſe ſlight and general remarks on Affidavits, I have nothing further to obſerve concerning them, but that they may be diſtinguiſhed as to their different ſubjects — either as they are Affidavits of Notice only; or as they go to the merits: and it is to the latter kind that what has been ſaid above is to be applied.

§. 40. Now to recapitulate all that has been ſaid in a few words — Practice in general, it appears, is either in Civil or in Crown Cauſes. In Civil Cauſes it is either independent of a

trial, or relative to it — If relative to it, ariſes either from ſomething applied for before, or after the trial. As to Crown Cauſes, you remember, only one diſtinction was inſiſted on, either as Practice concerned the original juriſdiction of the Court, or ſuch as is exerciſed, as it were, on appeal. And unleſs I was to read over to you a hundred printed Rules of Court, and the ſeveral Caſes and Books on this ſubject (which, by-the-bye, I would not wiſh any enemy I have to do) I can not undertake to be more explicit on this ſubject.

POLICRITES.

After you have been at the pains of ſo long a ſoliloquy, I ſhould be aſhamed to attack you under any head but that of palpable omiſſion. Though you have exceeded the ſtretch of the legal fiction,

tion, "that makes the Term but as "one day;" and in this view of Practice, may be ſaid to have brought many Terms into one, or in more animated phraſe, "have turned the ac-"compliſhments of many years into "an hour-glaſs[a];" yet give me leave to ſay, you have in one reſpect put me in mind of a fly buzzing about a candle; you have been round and round about the light without touching it; you have brought every part of Practice to the point of trial, and yet not ſaid a word about the trial itſelf.

EUNOMUS.

§. 41. Reflect a moment on your own compariſon, and you will want no anſwer. What would become of your poor fly, if he approached too

[a] Prol. to Hen. 5.

near the light? The danger of attempting this ſubject would not be leſs; the difficulty of deſcribing it would only prove the weakneſs of the undertaking. This field of Practice, I will own to you, I think, of all others, is the moſt extenſive, and gives one of the nobleſt views of our legal conſtitution. But great as it is in ſpeculation only, the idea of it in the abſtract will fall very far ſhort of what any one will conceive from a ſhort attendance on the Practice. Beſides, where ſhould I begin? or rather, how could I ſay enough of the excellence of the form, regulations and improvement of Juries? of the incomparable manner of ſifting truth in the perſonal examination of Witneſſes? of the admirable diſplay of reaſon and eloquence in the obſervations on Evidence, and the addreſs to

the Jury? and of the extreme caution the Law has obſerved in ſo nicely ſeparating the peculiar provinces of the Judge and the Jury; and when it has left the excluſive determination of the weight of Evidence to the Jury, the care it has taken that the Judge, in his recapitulation of the Evidence, ſhall repeat to them the material facts, naked, and undiſguiſed with the deceitful colouring of intereſt or of eloquence?

POLICRITES.

§. 42. It is this "very colouring" that the world ſo much object to, and which, in many caſes, makes truth ſo unlike herſelf, that it is not always eaſy to know her: ſo that if you decline expatiating on the excellency of this form of trial, I hope if it was only in regard to that, you will ſay a word

word about the abuſe of it. The Judge and the Jury I ſay nothing of: indeed, in this reſpect, there is no room to ſay any thing; the miſtakes of either, (as you have ſaid) ſhould they happen, may be ſet right after the trial. But the miſrepreſentations in other parts of the Proceeding are innumerable, and yet I know not how they are ever prevented. I will ſtate the objections in the very words of an old Citizen, who having been ſo unfortunate the other day as to loſe a cauſe of conſiderable value, and, as he conceived, from the perverſion of Truth and Juſtice, not the want of it in his own caſe, very innocently took his revenge by abuſing the whole Profeſſion in a large circle of his acquaintance.—" The ſtory of the Cow (meaning, I ſuppoſe, Swift's Cow) he ſaid, " was not more ſatirical than true; " and

" and it was far ſhort of the real
" abuſe. A ſtring of witneſſes are
" put into a brief, ſome of whom are
" to prove that two and two may
" make five, or that they never heard
" they made only four, juſt as occaſion
" requires: or if they come inclined
" to ſpeak the truth, the other ſide
" are prepared either to ſhew that
" they are not to be heard becauſe it
" is barely poſſible they may have a
" halfpenny intereſt in the conſe-
" quences of a poſſible determina-
" tion; inſomuch that, I believe, if a
" Teſtator in a Will of his Lands was
" to leave one of the ſubſcribing wit-
" neſſes only a halter, he would not
" be admitted as a credible witneſs:
" or elſe the croſs-examination is to
" be ſpun ſo fine that a man is at laſt
" beat out of common ſenſe, and is
" brought to contradict himſelf a
hun-

" hundred times without perceiving it;
" or when every other topic fails, the
" witneſs is to be abuſed, becauſe he
" does know what he is called for,
" or becauſe he does not, or becauſe
" he will not, ſay more than he knows.
" This raiſes a laugh among the coun-
" try people;

Solventur riſu Tabulæ.

" and the Jury find for or againſt the
" Plaintiff, as the Defendant or the
" Plaintiff are made moſt ridiculous
" in the courſe of the cauſe."—Thus far the old Gentleman.

EUNOMUS.

§. 43. And thus far will many people go when actuated by peeviſh diſcontent. How apt are we in moſt caſes to transfer the incapacity any where from ourſelves? No wonder if a man, judging of his own caſe, is induced

induced to think others in the wrong, who do not think as he does; and according to the degrees of partiality in his own breaſt to call the event ill-luck—ill fate—or injuſtice. One could not elſe well account for one man ſuppoſing himſelf wiſer or juſter than a whole Court; if it was not that he made himſelf a judge in his own cauſe: it is happy for us we are not. The kind of reflections you mention generally proceeds originally from the ſame circumſtances the old Citizen was in; and like all other ſcandal, once invented, is much eaſier propagated than refuted.

It is the duty of Council to repreſent their Client's Caſe according to inſtruction: that inſtruction is to be their indemnity on the one hand, as on the other every aſperſion for which they have no inſtruction they are anſwerable

ſwerable for in a courſe of juſtice; becauſe as the Law will not permit even affidavits upon oath of the party, by going out of a charge, to be inſtruments of ſcandal, much leſs will it endure a voluntary abuſe by a third perſon in going out of the courſe of evidence. On larger grounds, it may be ſaid, every Agent of a Court of Juſtice (whether Council, Attorney or Officer) is ſtrictly amenable to it for his conduct; and as the Law for excellent purpoſes, in conſequence of the truſt repoſed by any perſon in his Agents, will not oblige them *to diſcloſe* the material circumſtances of his caſe in giving evidence; ſo will it not endure any body, under pretence of being Agents, to vent ſcandalous reflections without authority. This I mean to ſay as to any thing advanced during the hearing of a cauſe on any perſons

perſons characters independent of evidence. But the comments that are made upon the evidence produced, or on the conſiſtency and behaviour of witneſſes, can never, I think, be deemed ſcandal in themſelves, tho' they may lead to it in the concluſion. If ſuch obſervations on evidence were not to be made with the utmoſt freedom of judgment, the courſe of juſtice itſelf would be interrupted: the concluſion from theſe, if it does affect the character of the parties or the witneſſes, is no other than what every moral agent (as ſuch indifferent and unprejudiced) who happens to be preſent, muſt draw from the whole of the ſtory he has heard.

And as to the perſonal ill-treatment of the witneſſes, which your inſtance put does more than inſinuate, whenever it does happen (tho' I hope it has

been oftener imagined than obſerved) there is always a power preſent able to controul it. But ſurely to conteſt the evidence by the ſtricteſt croſs-examination, is by no means to be deemed ſcandal, even tho' in the reſult the veracity of a witneſs may be rendered queſtionable. In this reſpect, the moſt perfect ſcepticiſm is the direct road to juſtice; for truth is conſiſtent with itſelf, and will ſtand the teſt of the cloſeſt examination: it is the only way to correct miſtakes; and if Perjury is latent, to detect it and bring it to day-light. Croſs-examination, I may ſay, is the *Rack of the mind*; *it is the only torture* the Law of England allows in the purſuit of truth; and it is a *torture only to an evil conſcience.*

This will be an anſwer as to the ſeverity of examination: as to the humour

humour that incidentally ariſes in ſome ſpecies of cauſes, and is furniſhed by the figure, demeanour and courſe of evidence of ſome witneſſes, it generally paſſes off lightly, and is not uncommonly equal on both ſides: but the effect of it, as to its weight in the cauſe, I may venture to add, is as tranſient as the laugh it occaſions. Beſides, a very little obſervation is ſufficient to convince every body, that the recapitulation from the bench, will eaſily diveſt any little prepoſſeſſion in the Audience gained by a jeſt or piece of humour. Tho', in the mean time, I know of no tranſaction in life that may be more juſtly conſidered as a kind of *natural comedy*, than ſome kind of trials are: in which the ſtory itſelf often exhibits a moſt diverting picture of mankind, eſpecially when the main plot is animated by a kind of under-plot

that diſcovers itſelf in the peculiar characters and paſſions of the witneſſes; many of whom, though they come with an earneſt intention to ſerve the truth, yet when they are warmed with a little examination, are apt to intermix ſome little paſſions of their own, with all the vivacity of genuine humour and quick repartee.

POLICRITES.

§. 44. But what between the miſrepreſentation of evidence, the miſinſtruction as to witneſſes, and their account being naturally imperfect as they were not concerned in point of intereſt to remember what happened, or never thought at the time it happened they ſhould be called upon to give any future account of it; it has been objected to the Laws of England, and thought to be a great ſpeck in our adminiſtration

adminiſtration of civil juſtice, that no perſon is allowed to ſpeak for himſelf.

EUNOMUS.

The objection, to give it any weight, muſt mean, that no perſon can be a witneſs in his own caſe—for ſpeak he does, or may, both on Record — and by the inſtruction he gives his Counſel as to the fact.

POLICRITES.

In particular inſtances, however, is not this complaint made with a ſeeming propriety, as involving in ſuch caſes particular hardſhips? A tradeſman, ſuppoſe, delivers goods to the buyer himſelf, no-body elſe preſent; or to the buyer's ſervant, who has left the place and not to be found; the tradeſman cannot be a witneſs in his own

caſe, and having no other witneſs to prove it, muſt loſe his debt.

EUNOMUS.

That the Law will not allow him to be witneſs, I grant; but it is not a clear conſequence that he muſt loſe his debt. Upon general principles, you muſt allow, it is extremely right, that the law will not allow a man to be a witneſs on oath in his own caſe: a witneſs in ſubſtance, tho' not in form, he is. He tells his own caſe on Record; and the circumſtances of it by his Counſel. It is well in the main he is not heard on oath; what Perjury would it introduce? and few caſes are ſo deſtitute of evidence as the caſe put. By the Law of England a man may oblige his witneſſes to come: and if a material witneſs is abſent for a time,

and

and may be had in a reaſonable time afterwards, it is, you know, every day's practice to put off the trial till he can be procured.

But in reality the caſe put (though ſeemingly a great hardſhip) will rarely happen: the inconvenience, by being univerſally known, may in general be prevented. This Rule of Law is founded on excellent principles; and it is the happineſs of our Law to be ſettled and known. A very little experience will teach tradeſmen this piece of knowledge; and one would think no one in general would deliver goods not paid for without ſome caution.

But even in the caſe put, he is not abſolutely without remedy; it is true he cannot be a witneſs at Law, and has no other on his ſide: but he has a remedy in Equity (as I ſhould ſuppoſe);

poſe); for, on the one hand, where there is as good a remedy at Law, none ought to be ſought in Equity; becauſe Equity is in its nature to follow, not to take place of the Law; and indeed it is the conſtant language of every Bill that the Plaintiff has no remedy at Law: it may thence, on the contrary, be inferred, that where he has no remedy at Law he muſt have one in Equity. A ſlight inſinuation to the contrary, if you remember, was one of the articles of Lord Somers's Impeachment: tho' probably had it been attempted to prove the Allegation, it might have turned out that he meant no more by ſuch declaration, than Lord Bacon before him did by his Jus precarium, or Right in Curteſy, for which he ſays there is no remedy at all.

Suppoſing then that in every caſe, where there is a right, properly ſo called,

called, there is likewiſe a remedy to obtain it (which, I believe, is one of the moſt univerſal maxims of our legal conſtitution). The tradeſman, in the caſe put, if he can have no redreſs at Law, may make his demand in Equity; the buyer will then be put to his anſwer on oath: if he denies the debt on oath, he may be indicted for Perjury, and the tradeſman will then be a witneſs in a caſe in ſome meaſure his own in point of intereſt, tho', for the Crown, in a courſe of public juſtice. But then the admiſſion of him as a witneſs is extremely conſiſtent with the great principle of Law before inſiſted on. For the end of this proſecution is not a civil ſatisfaction, but public puniſhment: and tho' by the party's conviction of the crime, the debt in reality is confeſſed, yet the evidence of the ſeller, to ſupport the conviction,

is not under that byas as it would be if the diſcharge of the debt was the conſequence of it; for he will then loſe his debt, and the puniſhment for the crime will be his only ſatisfaction. But the ſeller in the mean time has many chances in his favour, which the ſtrictneſs of Law did not allow him: the debt may be decreed in his favour, or if it is ſo flatly denied that no decree can be made, he has the chance of a diſhoneſt man's being driven in time to a confeſſion by the terror of an infamous puniſhment; and ſo avoiding the proſecution by paying the debt. I have reaſoned this caſe you have put more fully, becauſe indeed I have heard the Law arraigned in this inſtance: and the caſe if it ſhould happen, in all its circumſtances, would be an hard one, tho', I think, with

with the moſt ordinary caution, it rarely will.

POLICRITES.

§. 45. I own you have ſome time ago exhauſted my own cavils againſt our Law, and the general courſe of Practice: but, perhaps, there yet remain ſome diſputable points which will be ever urged from without doors; and tho' to you, or myſelf, they are mere phantoms, yet, to a great part of the world, they are of thoſe ſtubborn kind of ſpirits which it is not ſo eaſy to lay as it is to raiſe.

In two words, they ariſe from *the Delay* and *the Expence* of the Law. As to the firſt, by which a ſuit has been contrived to go for ſeveral ſucceſſive generations, it reminds one of the Giant of Sirius's account to the Dwarf of Saturn, in Voltaire, of the

Proceſs

Proceſs of a Law-ſuit in his country commonly laſting 250 years: but then it muſt be remembered, the Beings in our Planet have a duration of life more diſproportioned to the length of a Law-ſuit, than the Hero of Micromegas had.

And then the expence itſelf has commonly ſuch a ſting, independent of the delay of a cauſe, that it is thought if the Poor have a right, whatever becomes of the maxim, that every right has a remedy, the Poor not being in a condition to aſſert their right, muſt give it up. And as the Poor muſt in ſuch a caſe loſe their right, by not aſſerting it, others are in danger of becoming Poor, even by aſſerting it with ſucceſs. A victory itſelf proving the ſure cauſe of their ruin; revenge is death; two contending Spirits in a Law-ſuit, like Virgil's Bees,

Animas in vulnere ponunt.

Many

Many a Plaintiff, I doubt not, is obliged, like Tom Touchy in the Spectator, to ſell the field, after having recovered in an Action of Treſpaſs for breaking the hedge that incloſed it. Not to mention, that in every caſe the real coſts out of pocket will greatly exceed the coſts allowed by the Court to the party who ſucceeds in the ſuit.

EUNOMUS.

§. 46. Thoſe who think diſpatch the great excellence of Juſtice, will doubtleſs admire the quickneſs of a Turkiſh ſuit; and be inclined to prefer the determination of a Cadi (ſuch an one as Shaw and Norden have deſcribed) to the adminiſtration of Juſtice in their own country. The ſpeedineſs, as well as ſeverity, of Juſtice in Turky, is ſaid to be openly avowed on this principle, *that it is better two*

innocent men ſhould die than one guilty live. As we glory in adopting the very reverſe of this principle, a greater caution in conformity to the principle will neceſſarily produce a greater length in the enquiry.

This apology for delay, ariſing from compaſſion, will, I truſt, ſufficiently vindicate the formality required in our criminal proceedings: and if the delay here was greater than it is, it might ſtill be vindicated on the ſame principle,

Nam de morte hominis nulla eſt cunctatio longa.

But it will be ſaid, the principle is not at all applicable to the courſe of civil Juſtice, where the delay pinches moſt: and in general, I believe, there are many who have lived all their time in England, that have as little idea of a "Hearing being put off till "next Term," as the Czar Peter had,

had, when he was told the Proſecution for inſulting his Ambaſſador was ſo deferred. But let us anſwer thoſe who will hear an anſwer, by conſidering for a moment, to what the delays are unavoidably owing; and whether there is not leſs to complain of on this head now than formerly.

We muſt go pretty far back to trace the original of the ſlow and ſteady pace with which we are obliged to travel through Weſtminſter-Hall: at leaſt the two cauſes that ſtrike me as affording the moſt obvious ſolution of the difficulty are of a very ancient date, if they are not beyond the reach of Chronology. I think, in general, the delay is to be imputed to the inſtitution of Terms, and the general condition of the kingdom in early times: the latter cauſe aſſigned is indeed comprehenſive enough to take in

in the other. For the diſtance of theſe ſtated intervals for buſineſs may be very well accounted for from a view of the former condition of this country and its inhabitants. The inſtitution of Terms, it appears from Sir Henry Spelman, was partly owing to the Religion of the times, which was not without a conſiderable mixture of ſuperſtition; and this was the occaſion of ſhutting up the Courts of Juſtice all the time, but the ſummer vacation, which was governed by a conſideration of harveſt. The Vacations were conſidered in a religious view as the ſeaſons of "true peace:" the vera pax being, I think, uſed in our old laws in this ſenſe as ſynonimous to Pax Dei et Eccleſiæ, in oppoſition to Pax Regis, or the Peace of the Realm.

But

But the ſituation of the country itſelf very well juſtified the intervals preſcribed for Returns of Writs, from whatever motives they originally flowed. Reflect only upon the difficulty of travelling from the extreme bad ſtate of the roads; no poſts then inſtituted by which Proceſs might be diſpatched; the Proceſs itſelf all literally written; now they are *writs* rather in name than in reality; the common forms being printed with blanks, which are occaſionally filled up.

Conſider all this, and many other circumſtances, which will occur upon a more careful recollection, and rather than blame the delay of the Law at thoſe times, you will wonder with Sir Thomas Smith, "that three Tribu-" nals in one City, in leſs than a " third-part of the year, ſhould rec-" tify

" tify the wrongs of ſo large and po-
" pulous a nation as this of England!"

And as it was not in itſelf in thoſe times conſidered as ſo great a grievance, much leſs was it from compariſon with the practice of other countries. Forteſcue (if you remember) who was much in France, allowed us to have been much more expeditious in our proceedings than the Courts were there: tho' the courſe of Juſtice under an abſolute monarchy in its nature muſt be leſs interrupted with the delays of form than it is in a free country. The delay now (at leaſt with regard to the Practice of Courts) is much leſs than ever it was; one moſt certainly, tho' not the moſt conſiderable of our obligations to the preſent adminiſtration of legal Juſtice! How far it is yet capable of being further reduced, muſt be left to time and experience.

perience, rather than be haſtily decided by an unripe theory, which in proſpect of ſome imaginary improvements, may unawares ſtrike deep on the very roots of the conſtitution.

§. 47. In the article of expence, I am afraid, you inſinuated much more than you can ſupport in point of argument. At leaſt, I will ſay, if Poverty was a bar to Juſtice, the moſt golden clauſe in Magna Charta would be a dead letter: *Nulli vendemus, nulli negabimus Juſtitiam* would not be the voice of the Law, if the Law in its adminiſtration of Juſtice made the leaſt imaginable diſtinction between Rich and Poor. I know of no caſe where Poverty is under an exemption or under an incapacity with reſpect to natural rights: if it was under the latter, it would be hard indeed it ſhould not avail itſelf of the former.

1. No real Poverty however is an excuſe for the commiſſion of theft, or any other crime, in this, as it is in ſome countries; becauſe in England the caſe of extreme neceſſity is not ſuppoſed to exiſt: nor indeed can it be ſuppoſed conſiſtent with the proviſions made by Law for the Poor, independent of other public or private contributions.

2. Nor is real abſolute Poverty a permanent confinement even for juſt debts in every caſe; tho' ſuch a confinement is not contrary to natural Law, however it might in ſome caſes be not agreeable to humanity. In proof of which I need only remind you of the Laws particularly interfering to this purpoſe in the caſes of Inſolvents and Bankrupts.

The Inſolvent and the Bankrupt Laws agree in this, that they are humane

mane expedients to reconcile natural Liberty with natural Juſtice. The Debtor, who is the object of the one ſyſtem or the other, is to pay as far as he is really able to the Creditor; and upon that condition is not liable to be perpetually confined by his Creditor. They differ materially in many reſpects: the one regards only a particular debt, principally a ſmall one, whether the debtor is in trade or not; the other all the debts which a perſon in trade has contracted.

For this proviſion of the Bankrupt Laws is founded on a regard to *trade* merely; which as its very being depends on credit, ſo that credit muſt often involve the individual who is concerned in trade. There is then a natural compaſſion due to an inſolvent trader. He may innocently fail by his misfortune merely. But, at the

ſame time, there is a compaſſion due to his creditors; and as far as he is really able to pay, ſo far he ought. By the ſuppoſition, he cannot pay all his debts; it is agreeable therefore to good policy and natural juſtice, that he ſhould divide all his effects among all his creditors. The great hinges then on which the ſyſtem turns are theſe, 1. That for the benefit of trade in general, a real trader ſhall be permitted to regain his liberty, on ſurrendering all his effects; and that any concealment of his effects, at the time he would avail himſelf of this indulgence of the Law, ought to be deemed highly penal; and from a civil injury to the creditor, to become a crime to the State. 2. That his effects ought to be diſtributed equally among all his creditors, who prove themſelves ſuch: and the equity of this equal diſtribu-

tion

tion is ſtill more apparent, becauſe in conſequence of this diſcharge, no one, who was then a creditor, can moleſt him for the future, whatever new credit or circumſtances he may afterwards acquire in the world.

Two things however I cannot help adding, that it is injurious to trade and to juſtice to permit one really not a trader to be a Bankrupt: and that tho' one is diſcharged as a Bankrupt, and in point of Law a compoſition paſſes for payment, yet in point of conſcience the obligation to ſatisfy the whole will revive with the power of doing it.

3. The Spirit of our Law would be humane to the Poor to very little purpoſe in ſuch inſtances, if it in any degree deprived them of the means of ſuing for or defending their own rights. Indeed the conſtant practice of ſuing

or defending in *formâ pauperis*, in any Court in Weſtminſter-Hall, would be an anſwer to the ſuppoſition, if the ſuppoſition was not ſo abſurd as to require none.

As to the expence of Law-ſuits, it is often aggravated, no doubt, by the extravagance of the parties themſelves: but upon general principles admits of a clear vindication.

And a very few words will convince us of this, both as to the allowance of coſts in general; and, on the other hand, as to the limitation of that allowance, by making the coſts, permitted by the Court in moſt caſes, more or leſs to fall ſhort of the real expence the party has been at. 1. Coſts, in every civil ſuit, regularly follow the event of the cauſe. This is highly reaſonable in itſelf, and a great improvement of the antient Law, by which

no

no coſts could be had. It is certainly the only way of making it worth while to recover many rights; and, on the other hand, of puniſhing a vexatious ſuit, as no action lays for it. But in this latter reſpect the ancient Law is a little diſguiſed. It amerced a Plaintiff *pro falſo clamore*; it required pledges for proſecution; and it amerced a Defendant after verdict. Coſts, however, at preſent are not univerſal. 1. Certain only on a Judgment obtained in an Action. 2. Diſcretionary in Motions, at the pleaſure of the Court. 3. In criminal Proceedings, generally none at all; tho' here a party wrongfully indicted may reimburſe himſelf by Action. In Informations he has a third part of the fine by privy ſeal; where the Defendant is not permitted to agree with the Proſecutor. In ſummary Convic-

tions that are illegal, he has either an action againſt the Juſtices, or coſts by Act of Parliament. There is one thing that does indeed influence the expence of a ſuit, which is not properly the act of either party; and that is the expences on ſuits ariſing from the tax of the Government, which it may be thought perhaps is a charge unknown to former times; and an enormous weight on civil Juſtice. To this it may be obſerved, 1, That moſt Governments do, in ſome ſhape or other, tax Law Proceedings; and he muſt be a great ſtranger to the Engliſh Law who ſets up former times in this reſpect as a contradiction to the preſent. In former times, it is well known, real actions were almoſt the only ſuits; and in real actions the fine paid to the King upon ſuing out original writs, was always in proportion to the ſum

in

in demand; and bore a much greater proportion to it than the ſtamp tax does at preſent. Nay, a fine was paid for compounding ſuits; and reaſonably enough, as one party or the other muſt have been in the wrong to occaſion any ſuit; and in the end muſt otherwiſe have been amerced to the King. And that general practice, on original writs, is the well-known origin of (what are called) the præ-fine and poſt-fine now paid on levying a fictitious fine, as an aſſurance of land.

But, 2. The enormity of this charge is in many caſes not fairly to be imputed to the Law, but is more properly owing to the prolixity of proceeding: and then it is evident the party or his agents occaſion the weight of the burthen they complain of.

And it is this very circumſtance of one man, by his extravagance, ignorance,

rance, or prolixity, having it in his power to make a ſuit ten times more expenſive than it need be, that makes it abſolutely neceſſary for the Court itſelf where the cauſe is depending, to have a check over the party: and by its officers to regulate the proper degree of expence. For why ſhould one man be allowed to be liberal out of another's pocket? The conſequence of taxing a bill is, that your antagoniſt ſhould reimburſe you for the neceſſary expences you have been at in a ſuit in which the Court has judged his conduct unreaſonable. But it would be very unjuſt, that if either ſide was clear in his conſcience either that his antagoniſt has no defence, or the Defendant that the Plaintiff had no cauſe of action, yet he ſhould determine to make the ſuit ten times as expenſive as it need be, be-

cauſe

cauſe he knows the other ſide is to pay. The practice therefore of taxing coſts is reaſonable.

§. 48. And now, POLICRITES, as we have pretty well worn out our time, and our ſubject, as far as converſation will permit, let me aſk you, raillery apart, does it not appear that the Law throughout is founded on reaſon and principle; not perhaps intuitively clear in every caſe, but eaſily reconciled to them, if we are but at the pains of a moderate inveſtigation?

POLICRITES.

Not quite ſo moderate, when it muſt often be carried far back; and ſo many obſolete writers muſt be conſulted, who in general have been long conſigned over to duſt and neglect in the corner of a ſtudy. Are not the Year-books, and much older witneſſes, ſuch as

as Bracton and Fleta, now and then called on to prove the antiquity of principles, or to illuſtrate them by application? And when a witneſs is himſelf to ſpeak by an interpreter, in my poor opinion, it adds ſomething to the difficulty of examining his evidence.

EUNOMUS.

Thoſe caſes, it is true, will ſometimes happen: for this circumſtance muſt ever be attended to, that the Law of England is not only a Law of Reaſon, but of great Antiquity. This latter circumſtance undoubtedly does it great honour as a poſitive ſyſtem; but is often much in its way in other reſpects, as it tends to obſcure many a particular doctrine, the reaſon of which we may ſometimes loſe ſight of at this day. But then this circumſtance, fairly conſidered,

conſidered, points out its own remedy; the "ſtudy of antiquity."

§. 49. In our Profeſſion, as in every other branch of ſtudy, an attachment either to antient or modern learning, excluſively of the other, is partial and ill-judged: the one is more immediately for uſe, where the other is more generally only for entertainment: but tho' the application is entirely on one ſide, the illuſtration muſt often come from the other.

Any one who was to begin the ſtudy of his Profeſſion with the peruſal of antient books, would certainly begin at the wrong end. How unprofitable a fatigue would it be to commence our reſearches with the old doctrines of Attornment, Collateral Warrantys, and ſuch antiquated titles? A ſtudent might even endeavour to form an acquaintance with Lord Coke againſt his

own directions. He tells them, they ſhould "firſt read the later Reports;" and he could not but foreſee, that in giving this advice, He, like Ariſtides, was ſigning the ſhell that was to baniſh himſelf: for certainly what the year-books were then, Lord Coke in a great meaſure is now. The very ſame advice, if I remember right, Grotius gives as to the ſtudy of Hiſtory; and there is the ſame reaſon in both caſes. We propoſe in both caſes to make our ſtudies uſeful: and the ſtate of times, laws, and languages, are in ſuch a perpetual flux, that one who confines his attention to the ſtate of things, as they were three or four centuries ago, may be as much a ſtranger to what is now doing, as Queen Elizabeth, if ſhe was to riſe out of her grave, would be at the Council

Council Board; or Plowden, if he was now to attend at the Bar.

But Lord Coke, who at our firſt ſetting out is an advocate for modern Law, would think himſelf ſtrangely miſunderſtood, if we were to cite him as an authority for ſtopping there. He promiſes no harveſt to thoſe who are content to reap in the narrow ſpace of their own age: "out of the old fields, "he ſays, muſt ſpring the new corn." And it will at leaſt be an argument *ad verecundiam* in urging the neceſſity of the ſtudy of antiquity to Lawyers, to ſhew how much even thoſe have thought it ſo, who themſelves were no Lawyers. A book at my elbow has a paſſage of this kind, which, whether you recollect it or not, I am ſure will entertain you; I will read it.

"I might inſtance (ſays Lord Bo-"lingbroke) in other profeſſions, the

" obligation men lay under of apply-
" ing themſelves to certain parts of
" Hiſtory, and I can hardly forbear
" doing it in that of the Law; in
" its nature the nobleſt and moſt
" beneficial to mankind; in its abuſe
" and debaſement the moſt ſordid
" and pernicious. A Lawyer now is
" nothing more, I ſpeak of ninety-
" nine in an hundred at leaſt, to uſe
" Tully's words, " *Niſi leguleius qui-*
" *dam cautus, et acutus præco actionum,*
" *cantor formularum, auceps ſyllaba-*
" *rum.*" But there have been Law-
" yers that were Orators, Philoſo-
" phers, Hiſtorians: there have been
" Bacons and Clarendons, my Lord.
" There will be none ſuch any more,
" 'till in ſome better age, true ambi-
" tion, or the love of fame, prevails
" over avarice: and till men find lei-
" ſure and convenience to prepare
" themſelves

" themſelves for the exerciſe of this
" profeſſion by climbing up to the
" *vantage ground*, ſo my Lord Bacon
" calls it, *of Science*, inſtead of gro-
" veling all their lives below in a
" mean but gainful application to all
" the little arts of chicane. Till this
" happens, the Profeſſion of the Law
" will ſcarce deſerve to be ranked
" among the learned Profeſſions: and
" whenever it happens, one of the
" vantage grounds to which men muſt
" climb is metaphyſical, and the other
" hiſtorical knowledge: they muſt
" pry into the ſecret receſſes of the
" human heart; and become well ac-
" quainted with the whole moral
" world, that they may diſcover the
" abſtract reaſon of all Laws: and
" they muſt trace the Laws of parti-
" cular States, eſpecially of their own,
" from the firſt rough ſketches to the

" more perfect draughts; from the " firſt cauſes or occaſions that pro- " duced them, through all the effects, " good and bad, that they produced." What think you of all this?

POLICRITES.

——————— Si ſic
Omnia dixiſſet ——

He might, in a nobler ſenſe, *ſtill* have been " *John the Saint* [a]." Tho' I do not think, by-the-bye, that his own times were ſo barren of examples as he repreſents them. In that reſpect he rather deſerves the cenſure that has been caſt by Dr. Middleton upon Virgil, for transferring elſewhere the palm

[a] Alluding to Prior's tale of Earl Robert's Mice;

——————— eftſoons the Lord
Of *Boling*, whilome *John* the *Saint*———

and to the general character of his Philoſophical Writings.

of

of Eloquence and the laurels of fame, which never flouriſhed more than in his own country, and in his own age. And I can not but obſerve, that the noble Lord, notwithſtanding the ſpirit and force of his ſtyle, has copied his rant much better than he has applied it. Inſtead of degrading his own times by the application, he might from thoſe inſtances to the contrary in the profeſſion (the *Somers's*, the *Holts*, and the *Harcourts*) whom he did know, have been taught to think, or at leaſt to ſpeak, with more modeſty and candour of the *ninty-nine* whom he did not know. His notion however, in a liberal view, is highly commendable: it is right that a Lawyer, on proper occaſions, ſhould put on the Hiſtorian and Philoſopher.

EUNOMUS.

§. 50. The dreſs is certainly becoming, though it is not always to be worn in public: but neither is the habit of the Profeſſion. Our Terms and Vacations do perhaps, beyond any other employment, mark out intervals of hurry and retreat, of buſineſs and amuſement. Our ſtudies, more than any other, connected with the antient and modern world. Conſider only as to the knowledge of antiquity, how much is done to our hands in the elaborate reſearches of Selden, Spelman, Dugdale, N. Bacon, and Madox: more particularly by thoſe Writers who have connected ancient and modern learning; who have with great pains pointed out on any particular ſubject what the Law originally was, and in the room of which the modern is ſubſtituted. Such is Lord Hale,

particularly

particularly in his Hiſtory of the Law, and Preface to Rolle's Abridgment: ſuch are Serjeant Hawkins in his Abridgment of Littleton and its Comment; and Sir Martin Wright in his Hiſtory and Application of the Feudal Tenures.

§. 51. But leaving ſuch matters of antiquity as are of a higher nature, and which point out their own conſequence, how much of amuſement is to be met with even from this quarter? In the hiſtory of the profeſſion, its ſeats of reſidence, its various degrees of dignity, its diverſions as well as its diſcipline?

There are traces yet viſible that ſhew many particulars, with regard to our Profeſſion, are of an eccleſiaſtical origin. The Coif is agreed to be the invention of the Clergy to diſguiſe their Tonſure when prohibited to prac-

tiſe in the Temporal Courts; our Bands, our Habits, and general tenor of our Dreſs, tho' till the time of Charles the Second, they varied much, (as appears from comparing old Hiſtories and Prints,) ſeem to proclaim the ſame original. The old Books ſeemed to have almoſt included Weſtminſter-Hall itſelf within the pale of the Church. For inſtance; when they caution pleaders againſt too nice and technical concluſions in forming iſſues, that are to be tried by a Jury, they do it "becauſe the *Lay-people*," they ſay, (meaning the Jury) "will not under-"ſtand it." And Mr. Madox tells you, the Lord Chancellor was for a long time the King's *Chief-Chaplain*, and had the ſuperior care of his Chapel, as well as of his Chancery. And the general and extended denomination of *Clerks* to the Deputies in Law-Offices, and thence, by

by degrees, to all Offices whatever, are plainly owing to the circumſtances of our Law-Offices having been originally, and for a long time, filled by ſome of the Clergy. That, in particular, the Six Clerks in Chancery were of the Clergy is acknowledged on all hands; and it appears from the Parliament Rolls of 4 Ed. III. that the Lord Chancellor uſed to give the benefices under a certain value, the patronage whereof is in the Crown, "to the "Clerks in Chancery, who had long "laboured in that place." And hence, tho' nearly on the eve of the Reformation, the Statute of Hen. VIII. was made to enable them to marry; becauſe tho' the office was then chiefly filled by Laymen, yet the Clergy were not diſabled from holding theſe offices, any more than the higheſt office in Chancery. Not but in this latter

caſe, uſage, which began ſoon after this time, concurring with the extended and more difficult juriſdiction of the Court, requiring an education in this track, pretty well eſtabliſhed the common Lawyers in the important truſt of the cuſtody of the great ſeal.

§. 52. And this connection of the Profeſſion of the Law with the Church, does perhaps in part account for the Law itſelf having for ſome time no fixed reſidence for its Profeſſors. That 'till within our time there was in point of education no connection between the common Law and the Univerſities ſeems pretty evident: and our Profeſſion (tho' it has been abundantly made up to it ſince) had reaſon to lament, that every ſcience, but the municipal Law, was taught there. The Law, in the earlieſt times of which we

we have any notice, Lord Coke ſays, and other authorities beſides a Record in 19 Hen. III, warrant him in ſaying, was taught in London by learned men of the Law, who ſat up ſchools for that purpoſe. For Selden tells us, that before the reign of King Stephen, the municipal Laws were taught in the monaſteries, in families of greater diſtinction, and, he adds, "in Academiis, Collegiis, Alibique." But I know no evidence of hiſtory to explain the latter words as they have been underſtood to mean our two Univerſities. The inference from ſuch hiſtorical accounts as we have is rather to the contrary. The words "in Academiis et "Collegiis," are equivocal, and do not neceſſarily import our Univerſities, properly ſo called. The very ſchools, mentioned from the Record of Hen. III. will bear the term: and Forteſcue

and

and Lord Coke, though they both allow the Univerſities of Oxford and Cambridge were ſtrangers to the ſtudy of our Law, do yet call the Inns of Court and Chancery by the very terms of "Univerſity and Col-"leges."

It ſeems to me not improbable, that the abolition of the Law Schools, by the prohibition that iſſued 19 Hen. III. might in part give occaſion to a more regular courſe of inſtitution, and fix the places of reſidence that we enjoy at this very day. The Temple, which was the earlieſt of them, appears to have been firſt applied to this purpoſe in Edward the Second's time. I leave the particular hiſtory of theſe noble ſeats of learning to the elaborate Antiquaries who have obliged the world upon this ſubject; particularly Forteſcue, Lord Coke, and Dugdale, with ſome

ſome diſſertations of this kind read before the firſt Antiquary Society, and collected by Mr. Hearne. And I am not without hopes that the learned Body of that name *now ſubſiſting* will in time permit theſe ſubjects to have ſome ſhare in their curious reſearches.

There are ſome circumſtances however reſpecting their ſituation and eſtabliſhment I cannot altogether paſs over. They ſeem to have been fixed in this ſpot, to be as much as could be in the center of the town, and yet out of the noiſe and hurry of it. And it muſt be owned their ſituation is admirably calculated, with this mixed view. They are at this day between the Cities of London and Weſtminſter; and by their ſquares, courts, and ſpacious buildings, anſwer very well the various purpoſes of health, ſtudy, buſineſs and retirement. You may think

think perhaps they ſhould have been nearer Weſtminſter-Hall, the great field of practice; and that their ſituation does not juſtify what (I ſaid) was one end of fixing it, to be as near as could be in the center of the town. The times in which the Inns of Court were eſtabliſhed will anſwer both objections. If we view London as the map exhibits it even in Queen Elizabeth's time, it will from thence appear, that noblemen's houſes occupied all the intermediate ſpace between Weſtminſter-Hall and the extremity of the City. But could the Inns of Court have been fixed nearer the Hall, they would only have accommodated the Profeſſion in one reſpect, and too much at the expence of every other convenience. After this ſlight obſervation on the convenience, reflect a moment on the delightfulneſs

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and the dignity of the ſituation. Two of them on the bank of the River; and in thoſe days the whole bank from the Temple to Weſtminſter lined with palaces of the King and ſome of the firſt Noblemen of the kingdom: what the other two wanted in the view of the River, they made up in the extent of their Gardens.

Thoſe writers who have called the Inns of Court and of Chancery by the name of an Univerſity, do by no means degrade the term according to its more genuine and ſtrict acceptation. In the firſt place, the number of diſtinct houſes (comprehending thoſe of the Inns of Court and of Chancery, the latter of which are in ſubordination to the former) are not much leſs than the number of Colleges. But many internal circumſtances will much better ſupport the analogy thoſe writers

ters conceived between them. It is eaſy in many particulars to run a parallel between the Inns of Court and the Univerſities.

They agree in each having ſeveral degrees to be taken by the Profeſſors of their reſpective ſciences; in various exerciſes required as qualifications for thoſe degrees; and in the original inſtitution of public lectures; tho' a diſuſe of theſe in the Law Societies has long made a breach in that part of the Parallel. By the Law lectures alluded to, I mean thoſe readings on Statutes that have been in ancient times ſo great a channel of legal inſtruction, were delivered with ſo much pomp and grandeur, and derived ſo great an authority: of which the reading on the Statute of Uſes is a ſufficient inſtance.

The internal government too is, as to its nature and inſtitution, as perfect

here as in Colleges; the Treaſurer and Benchers having the ſame power over the members, by "the orders of "the houſes," as the Maſter and Fellows have by the Statutes of a College. If any thing, their domeſtic policy, tho' under an Ariſtocratical form, is more extenſive within the walls than it is in Colleges; becauſe the *Bench* unite the legiſlative and the executive power over their Societies: as they not only execute orders in being; but can vary their orders or laws as occaſion requires. Our Inns differ from Colleges as being poſſeſſed (I think) of no eſtates, excluſive of their own and the ſubordinate houſes; their public incomes ariſing from fees on admittance of Members, and on taking degrees; from fines, in nature of penalties, for not doing exerciſe or paying dues; and from the profits of Chambers.

§. 53. The

§. 53. The degrees I mentioned in our profeſſion are thoſe of Serjeant at Law, Bencher, and Utter-barriſter. The editor of Sir H. Spelman's work ſeems not quite ſo accurate in his manner of claſſing them: he reckons (if I remember right) *in foro regni*, in contradiſtinction from the *foro civili*, the degrees of Serjeant, Apprentice, and Barriſter. But an Apprentice diſtinguiſhed from a Barriſter, and whom he places higher, never could be conſidered as a graduate, but a mere ſtudent.

That of Serjeant he has rightly placed as the higheſt degree of the Law, and of which no time traces the origin. Its hiſtory opens a large field of enquiry: at preſent it is ſufficient to obſerve, that the antient ſplendor of this "ſtate and degree" (as the writ always ſtiles it) may be judged of from many

many circumſtances attending it at this day, but is more evident from others now obſolete. The antient manner of taking this degree ſtill retained; the precedence thoſe, who took it, ſo long had of the reſt of the bar; their power of taking fines, and of ſitting in circuit commiſſions, as Judges; the neceſſity of ſtill taking this degree as a qualification for that Bench, added to a former circumſtance of the Bench being rarely filled but by thoſe who had for ſome time enjoyed this degree; all taken together tend to ſhew this order is a very antient, honourable, and vital part of our legal Conſtitution.

The editor of Spelman has not ſtopped to explain either of the other degrees: nor has Dugdale, tho' he has collected copious materials reſpecting both, been at the pains of ſufficiently ſettling the nature of either. The term

itſelf however will ſerve to diſtinguiſh a Bencher from a mere Barriſter. But the confuſion ariſing from calling the latter more generally an Utter-barriſter, without any explication of the term, has introduced much perplexity on this ſubject. And as I mean to read to you (what I have collected, in a very ſmall compaſs) ſome of the particulars that Dugdale has ſo widely diffuſed about the qualification, and ſtanding for the Bar, I ſhall be excuſed in going a little out of the way to explain the term itſelf.

Dugdale, inſtead of defining what is meant by "Utter-barriſters," copies Lord Coke, who ſays, that out of Mootmen, after eight years ſtudy or thereabouts, are choſen Utter-barriſters, that is, are called to the bar; tho', as I ſaid, he does not account for the etymology of the term.

Neither does Cowell, whoſe definition however, as it is ſupported by the facts I ſhall after mention, is worth reading to you: "Utter-barriſters (he "ſays) are ſuch as, for their long "ſtudy and great induſtry beſtowed "on the knowledge of the Common "Law, are called out of their con-"templation to practice, and in the "face of the world to take upon them "the protection and defence of clients. "Theſe are in other countries called "*Licentiati in Jure*; howbeit, in mo-"deſty, they ſtill continue *themſelves* "*hearers for divers years*, like the "Scholars of Pythagoras, that for the "firſt five years never adventured to "reaſon or diſcourſe openly upon any "point of their Maſter's doctrine."

Blount (who wrote in Charles the Second's time, about the year 1670), in his expoſition of the term Utter-barriſ-

ter, copies Cowell, in the paſſage I have read, as far as "*Licentiati in Jure*;" he fixes the period of calling to the bar at ſeven years; but ſays nothing of the ſilence either injoined or practiſed after being called: tho' it appears by the old orders made in James the Firſt's time, and continued till after the publication of his book, that ſuch ſilence was in fact then injoined. After mentioning exerciſes, uſual before and after being called, he adds, "They are called "Utter-barriſters, that is, Pleaders "without the Bar, to diſtinguiſh them "from Benchers, or thoſe who have "been Readers; who are ſometimes "admitted to plead within the Bar, "as the King, Queen, or Princes "Council are."

Having thus, as I take it, ſhewed, that Utter-barriſters, and Barriſters ſimply ſo called, are in reality the ſame;

ſame; I ſhall now perform my promiſe in reducing into a very narrow compaſs what Dugdale has inſerted a great number of particulars to ſhew, *viz.* what ſtanding and what orders have been made, and what qualifications have been required for the ſtanding at the Bar. I do it with a view of commending in the beſt manner, that is, from compariſon, the laſt order made for this purpoſe; which, after reading to you ſuch concluſions as I had formerly drawn from Dugdale, you will much better underſtand and approve.

1. It appears that orders and regulations have from time to time been made with reſpect to the qualifications required for being called to the Bar; ſometimes by the reſpective houſes themſelves, in which each judged for itſelf, and no uniform rule was ob-

ſerved; ſometimes regulations were preſcribed by the Judges for the common direction of all the Inns of Court; and ſometimes by command of the King or Queen, with the advice of the Privy Council and Judges; as was the uſual practice during the reigns of King James I. King Charles I. and King Charles II. But no inſtance till the other day (in print at leaſt) appears of a voluntary and uniform concurrence of all the Inns of Court to eſtabliſh one common ſet of regulations, which, well conſidered, reflects great honour on the preſent eſtabliſhment.

2. The qualification in point of ſtanding for the Bar, has been very different at different times. At one time, in the Middle Temple, it was twelve years; by many public orders no time was limited; but under a general deſcription

ſcription of "convenient continuance," as in 36 Eliz. and 12 Jac. I. By later orders it ſeems to have been fixed to ſeven years continuance, as 16 Car. II. ſo in 38 Eliz. In the intermediate periods, where the time was fixed, it ſeemed to be "at eight years," as in 6 Car. I. and in the Middle Temple 16 Car. I.

3. It appears, that whatever qualification in point of ſtanding was neceſſary in order to be called to the Bar, it was a conſtant rule to reſtrain for ſome time the practice at the Bar. At Gray's Inn, 13 Eliz. no Utter-barriſter was to come for five years. By a general order, 3 and 4 Philip and Mary, no Utter-barriſter ſhould come to any Bar at Weſtminſter under ten years continuance (tho' the meaning of that order ſeems a little doubtful). In 16 Eliz. 1574, it was five

years. In 12 Jac. I. 6 Car. I. and 16 Car. II. it was reduced to three years after the call.

4. Some perſons have entirely been excluded from being called to the Bar. It ſeems that thoſe who had practiſed, were by theſe orders under a perpetual incapacity of being admitted into any of the Inns of Court; and therefore under a perpetual diſability of being called to the Bar. The preſent order, in propoſing a limitation, ſeems to be much more liberal, and more for the general good than an abſolute excluſion. In 1 Jac. I. by a very ſolemn order (ſigned by Lord Coke, Lord Bacon, and others) it was required as a qualification, and made perpetual in its terms, that nobody ſhould be admitted into the Inns of Court *that was not a gentleman by deſcent*.

5. To avoid theſe ſeveral orders being diſpenſed with by letters, corruption,

ruption, or reward, particular clauſes (as in 36 Eliz.) as well as ſtanding orders, made it expulſion in the Reader who called, and in the perſon who was called to the Bar.

6. Many orders reſtrained the number of perſons to be called at any certain time; notwithſtanding the other perſonal qualifications were complied with. And then it was a conſtant inſertion in ſeveral orders, with a preamble declaring the reaſons of ſuch an order. The 38 Eliz. §. 4. is ſingular in this reſpect; for when it limits the number to be called, it directs the preference, *cæteris paribus*, to be given to thoſe who moſt excelled in morals and literature; which circumſtance indeed one would imagine afforded the true ſpirit of the other orders, while a limitation continued, tho' no ſuch preference was inſerted.

If it was aſked, what is the general *utility* of regulations of this kind; and what in particular the *neceſſity* of them at this time? It might be obſerved, the number of Lawyers, as well as Laws in England, are ſuppoſed to exceed thoſe of any other age or country. The Roman Laws, though greatly exceeding the ſyſtem of Grecian Laws, had ſcarce any regulations as to the Lawyers in the age of the Republic. In the latter ages the number increaſed, and ſome qualifications were required. They could not be Advocates under ſeventeen years; they were examined before they were admitted as Advocates; and they had their various degrees. In the Athenian State, Orators or public Speakers (for Lawyers diſtinguiſhed merely as ſuch ſeem to have been of little regard) were to be thirty years old, unexceptionable in their moral

moral character, and guarded in their behaviour as Orators, tho' only finable if not ſo; but no previous teſt of their abilities was required.

In England, our great and increaſing body of Laws, though not ſo much to be lamented in itſelf, if it is in a great meaſure the conſequence of freedom, is however a great argument in this caſe of the neceſſity of a well-regulated Profeſſion requiring proper teſts from its candidates. All your objections to Pleading and Conveyancing prove it. How ridiculous indeed to think an ordinary trade ſhould require ſeven years apprenticeſhip, and a profeſſion ſo extenſive as in its turn to conſult the affairs of all mankind, ſhould require no preparation at all!

The preſent times perhaps require at leaſt as much check as the paſt; becauſe

cauſe proceedings are now all in Engliſh; and any one might otherwiſe be called to the Bar without any previous ſtudy or qualification. But on the other hand, where there has been a learned education, completed at the Univerſity, and which happily for this age is the prevailing mode, much leſs time and application will ripen the mind for the Bar. I think both theſe circumſtances are well attended to in the laſt order of 1762.

Thus you ſee have our anceſtors taken the greateſt pains to ſecure the knowledge and purity of the Profeſſion, as well by way of education as conduct, through every ſtage. They could not take too much pains in this point, if we conſider the character itſelf, as Tully has done; tho' I think it may be ſaid with more truth in England, than it ever could be of old

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in Rome, *Juris-conſulti domus totius eſt oraculum civitatis.*

§. 54. Our anceſtors too, partly I ſuppoſe by way of indulgence and relaxation of younger minds, from the ſeverity of a dry ſtudy, and partly to give the world a proof of their ſplendor and hoſpitality, chequered diſcipline with diverſion; and with the weightier matters of the Law would mix the amuſement and gaiety of the times. Not to repeat what Dugdale has collected of the expence and ſolemnity of the Chriſtmas and Readers Feaſts, kept within the walls of the Inns of Court; the *antique Maſques and Revelries*, introduced upon extraordinary occaſions, as to the grandeur of the preparations, the dignity of the performers, and of the ſpectators, at which our Kings and Queens have condeſcended to be ſo often preſent, ſeem to have exceeded

exceeded every public exhibition of the kind. Here too Dugdale has not been wanting in the pains he has taken to inform us; and ſome farther materials are furniſhed by Lord Clarendon and Sir Bulſtrode Whitlock.

Our judgment on matters of antient ſtory is too apt to take a tincture from the manners of the age in which we live; and then, if they happen widely to differ from our own, they muſt in this light appear deformed and ridiculous. This obſervation will ſufficiently account for the profuſion of raillery, our Poets have thrown on the particular diverſions now before us.

Our veneration for antiquity, however, has at length, at a proper period, given way to good ſenſe, which can never well conſiſt with a ſcrupulous adherence to matters in themſelves of the moſt perfect indifference, and quite contrary

contrary to the ſpirit and general practice of the times. The Maſques and Revels were not ridiculous as uſed by our anceſtors, but would be ſo if kept up now; becauſe the diverſions (which muſt always conform to the humour of the age) are as different now from what they were a century or two back, as the language, the dreſs, and general prevailing manners of thoſe times, are from the preſent.

§. 55. And now after all, my dear Friend, what is there in the view we have taken that is really formidable? much leſs than the *twenty years lucubrations* of Forteſcue, or the *ſix hours a day* of Lord Coke, will enable us to acquire thoſe principles of legal knowledge, that are neceſſary in every branch of the Profeſſion. To what degree they are to be applied is left for ourſelves to determine. We may expand or contract

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the ſail as the wind favours or is againſt us in our courſe. And tho' it will be ſaid very few of the innumerable adventurers who embark with a deſign of croſſing this troubled ocean, do arrive at their wiſhed-for port after a ſucceſsful voyage; do we not often, in the mean time, attribute to ill ſucceſs, what may perhaps as often be imputed to ill management?

Sometimes we take no pains at all: at other times we begin; but a ſudden indolence, like a miſt before our eyes, makes the difficulties that lie in the way appear ſo formidable, that the conqueſt neceſſary to our progreſs is too ſoon deſpaired of: and we give up this path to Fame as inacceſſible. Very often impatience is our principal obſtruction; we look at the top of the hill, without conſidering that to get there we muſt begin at the bottom:

tom: and that the higher it ſtands, the finer proſpect indeed it will command, but the longer or the ſteeper will be the aſcent.

Of the two extremes, preſumption of ſucceſs in an attempt (if it goes no farther than ourſelves) ſeems more eligible than deſpondence; and the reaſon of it I can not explain more forcibly than in Virgil's words,

——"*poſſunt, quia poſſe videntur.*"

There is certainly this to be ſaid in its favour, that thoſe who doubt of ſucceſs in any undertaking, will not exert their ſtrength ſo much as thoſe who are confident of it: and therefore, as far as want of ſucceſs may juſtly, as it often may, be imputed to an undue exertion of the means in our own power, ſo far the want of confidence may be the occaſion of ill ſucceſs.

In this lottery, POLICRITES, (for the world at large, as to the influence of chance, or, to ſpeak more properly, unforeſeen cauſes on the fortunes and conditions of men, is itſelf a kind of lottery) the number of great prizes will ever bear a ſmall proportion to the number of competitors. You, or any of your cotemporaries, may or may not in the end have the very prize on which you fixed your eye at the outſet: but can he ever have it who takes his ticket out of the wheel before the prize is likely to be drawn? For our comfort, however, in this lottery of the Profeſſion, there are comparatively but few blanks, if indeed there are ſtrictly any. The time and labour we employ, which may be conſidered as the price of our tickets, muſt always produce uſeful knowledge; tho' the knowledge that is acquired

may not be attended with the profit or eminence that we expected.

§. 56. I can not give a ſtronger recommendation of all I have been ſaying, than in the account of a neighbour of mine, who is juſt come into the country, whom I have thoughts of calling on this afternoon; and as I wiſh you to go with me, I will endeavour to give you a general notion of his character.

He is now turned of fifty; and after having been long engaged in the firſt buſineſs of the Profeſſion, in which the world has been an ample witneſs of his abilities and integrity, he has ſecured an honourable retreat, at the very time one would moſt wiſh to enjoy it: and having declined higher honours, rather than miſſed of them, paſſes the remainder of his days with the perfection of his faculties, in a

quiet rural ſolitude. A retreat in life of this kind, reminds one of Longinus's admirable compariſon of Homer's Odyſſey to the *ſetting ſun:* the picture of which ſeems to have been copied (or at leaſt is as happily imagined) by Prior [a], who deſcribes that ſun with

"*Its beams entire, its fierceneſs loſt.*"

Agreeably to the criticks idea, there muſt ever be a great affinity between compoſition at any age, and the general character of the age itſelf. The fire of youth, and the calm of advanced life, will each in their turn give the prevailing caſt to morals as well as writings. The perſon I am deſcribing reſembles, in the tenor of his manner and converſation, the evening of a fine day; exhibiting a clear ſerene light without dazzling the eye. True greatneſs will ſhew itſelf as much in retire-

[a] Looking-Glaſs.

ment

ment as in action; at leaſt to the few, who are capable of judging of it, tho' the world at large may think otherwiſe, or overlook it. A quick ſucceſſion has almoſt worn my friend's memory out of Weſtminſter-Hall; which circumſtance, He, as a wiſe man, only laughs at, as a ſeaſonable check to the vanity of thoſe who think to be remembered by poſterity at a hundred years diſtance.

He is bleſſed with a family whom he has educated in every accompliſhment ſuitable to his fortune and ſtation; and his example (which is always the beſt part of education) has inſpired them with a regularity of conduct, and a harmony of temper equal to his own. He ſtill ſhews his regard to his Profeſſion by breeding up his eldeſt ſon to it. His notions in this reſpect, however, are ſomething ſingular,

gular. I have often heard him ſay, it would be well if every gentleman of fortune had ſome inſight into the knowledge of the Profeſſion of the Law; which he would find the uſe of as a neceſſary part of education: as it would beſt enable him to underſtand the hiſtory and conſtitution of his country; would teach him beſt to manage his own concerns, without too much reliance on others; and would enable him to act with eaſe and credit on many of thoſe occaſions in life, where every man of rank ought to have ſome degree of legal apprehenſion, and without which he will be miſerably embarraſſed, whether he was called upon as a Juryman, an Executor, a Truſtee, a Juſtice of Peace, or in the higheſt character, that of a Legiſlator.

He uſed to add, however, that He would never breed up a ſon of his for the

the Profeſſion, if he could not leave him a competence independent of it; becauſe he doubted much whether he could thrive in it at all events, without ſometimes ſacrificing more of his honour and conſcience, than a man of any delicacy would wiſh for. He uſed to ſay, there was no employment where there are more temptations to act with latitude than in this. This notion of his, tho' ſingular, and not altogether, I conceive, well founded, may be accounted for from a great degree of natural modeſty in himſelf, which, in reality, was a greater obſtacle to him than he knew of. And he remains an extraordinary inſtance to ſhew, that great abilities, without ſome little ambition, will never reach the higher ſtations of eminence: but he is at the ſame time an inſtance to ſhew, that ſuch abilities, joined with ſuch moderation,

tion, can enſure a happineſs that is very rarely to be had, tho' the utmoſt heights of ambition ſhould be attained. To conclude this ſketch of that excellent perſon; He ſtill acts as a Lawyer in giving friendly advice to his neighbours; and they, on the other hand, are well ſatisfied with his advice; and, at his interpoſition, often part friends with one another, tho' they met with an averſion great enough to ſpirit up a proſecution. Theſe are ſome of the principal out-lines of his character, that have ſome reſemblance, I believe, as far as they go; but are by no means full enough to be a juſt portrait. You will much better finiſh it yourſelf from his company and converſation, to which I will introduce you.

END of VOL. II.